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Supreme Court, U.S.
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No. 05-419

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI *Pro se*
Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.*,
Respondent/self-employed participant and trustee,
Law firm employer plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

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QUESTIONS PRESENTED

I.

Whether *sua sponte* dismissal here is *bias* or error, where undisputed allegations are: 1) fiduciary respondents violated provisions of the divorce code/ civil rules/ child support/ ERISA/ tax code statutes and the *Bifurcation* Order, which 2) judicial respondents failed to enforce, 3) at a loss to Petitioner/*alternate payee* and profit to *plan* respondents; a ruling contrary to limitations of the *Rooker-Feldman* doctrine set forth by this court in Exxon[1]; and inconsistent application of the doctrine in Parkview[2]; and Moore[3]?

II.

Whether district courts have jurisdiction to hear a suit to enforce ERISA component of a divorce action where trial court issued a *decree* and *bifurcation* order, reserving jurisdiction over Petitioner/*alternate payee*'s rights under ERISA, which the state and lower courts failed to enforce?

III.

Whether the lower courts inequitably violated due process rights of Petitioner/ *alternate payee*, when the courts:

a) Failed to enforce litigant disclosures and orders;
b) *Sua sponte* dismissed the claim with prejudice;
c) Failed to consider undisputed state court errors;
d) Failed to entertain an appeal of Petitioner's claim.

IV.

Whether undisputed judicial failure to enforce violations of 1) civil rules/ divorce code/ child support/ ERISA/ tax code statutes and 2) *Bifurcation* Order, a 14th Amendment violation, warrant sanctions?

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[1] Exxon Mobil. v. Saudi Basic , 125 S. Ct. 1517, 1521-22 (2005).
[2] Parkview v. City of Lebanon, D.C. No. 98 cv 455 (3dCir. 2000).
[3] United States of America v. Moore, No. 03-2698 M.D. (3d Cir. 2004).

PARTIES

Suit to enforce ERISA component of divorce action.

MARY ELLEN CHAJKOWSKI *Pro se,*
Petitioner/alternate payee,

v.

JOSEPH J. BOSICK, *et al,*
Respondent/Self-employed plan participant,
Law firm plan trustee;
PIETRAGALLO, BOSICK AND GORDON SALARY REDUCTION PROFIT SHARING PLAN, *Respondents/ Employer plan,*
WILLIAM A. PIETRAGALLO, JR., ESQUIRE,
JOSEPH J. BOSICK, ESQUIRE,
MARK GORDON, ESQUIRE,
Respondents/ Employer plan trustees;
MAX BAER,
KIM D. EATON,
P.J. E. CIRILLO,
PATRICK R. TAMILIA,
KATE FORD ELLIOTT,
CORREALE F. STEVENS,
JOAN ORIE MELVIN,
JAMES R. CAVANAUGH,
Respondents/Pennsylvania judges.

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CITATION TO OPINIONS/ORDERS BELOW

04-cv-1582

District Court, *sua sponte* dismiss, October 20, 2004.
District Court, denied Reconsideration, Nov. 2, 2004.

04-4449

Court of Appeals, Judicial Respondents' motion to be excused from filing a brief granted, March 3, 2005.
Court of Appeals, affirmed dismissal, June 6, 2005.
JUDGMENT TO BE REVIEWED, Court of Appeals, *sua sponte* denied Rehearing *en banc,* July 5, 2005.

Pennsylvania Orders -FD 97-009496-006
Bifurcation/ Stipulation/ QDRO

Pa. Com. Pl., Pretrial Order, November 1, 2000.
Pa. Com. Pl., *Bifurcation* Order, December 26, 2000.
Pa. Com. Pl., Decree in Divorce, December 29, 2000.
Pa. Com. Pl., Counsel Stipulation, April 4, 2001.
Pa. Com. Pl., trial court QDRO, qualified by the *plan*, 2001 evidence/ 2002 ED, February 25, 2003.

Respondents' 401k Exclusions from Child Support

Pa. Com. Pl., APL/child support, March 18, 1998.
Pa. Com. Pl., APL/child support, December 30, 1998.
Pa. Com. Pl., $49,935 support arrears, Jan. 4, 1999.
Pa. Superior Ct., 759 WDA and 819 WDA 1999, Opinion and Order, August 4, 2000.
Pa. Supreme Ct., Nos. 666 & 667 WAL 2000, denied Petition for *Allocatur,* April 2, 2001.
Pa. Com. Pl., Hearing Officer, $100,519.53 overpayment APL/child support, November 30, 2004.

Equitable Distribution *Plan* Assets

Pa. Com. Pl., Seal the Record, April 9, 2002.
Pa. Com. Pl., Equitable Distribution, April 10, 2002.
Pa. Superior Ct,1522/ 1544 WDA 2002 (02/12/04).
Pa. Superior Ct., 1522/1544 WDA 2002, denied Petition to Supplement, June 20, 2003.
Pa. Supreme Court, Nos. 172/ 173 WAL 2004, denied Petition for *Allocatur*, July 21, 2004

JURISDICTIONAL STATEMENT

Order Below

Chajkowski v. Bosick, Dkt. No. 04-4449 (3d Cir.) Order entered July 5, 2005, denying *en banc* rehearing. (Unreported).

Statutes Conferring Jurisdiction

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. ... 28 U.S.C. § 1254 (1988).

Supreme Court Rule 10:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

...

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const. Amend. XI Sovereign Immunity: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const. Amend. XIV, §1 ". . . .nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Employee Retirement Income Securities Act, U.S.C.A. § 1001 *et seq*. (text provided in full in Appendix II).

IRS Code 401k (text provided in full in Appendix II)

Pennsylvania Divorce Code (Text provided in Appendix II)

ERISA Section Five Enforcement Powers (text provided in Appendix II.)

Pennsylvania Child Support Statute (text provided in full in Appendix II).

STATEMENT OF THE CASE

Petitioner/*alternate payee's Pro se* suit to enforce the ERISA component of a divorce action was *sua sponte* dismissed with prejudice by the district court, affirmed by the court of appeals, and hereby appealed.

Plan assets at issue include insurance, securities, trusts, real estate and corporate interests, all subject to statutory disclosure requirements. Exercising a statutory right to *plan* disclosures is a compliance issue not limited to divorce; it was a required response in this divorce litigation.

Respondent(s)/*Self-employed plan participant-trustee, law firm plans, and plan trustees* represent themselves, as counsel of record is a law partner.

The lower federal courts required no litigant disclosures to screen conflicts. The appeal court issued a briefing order that it inequitably enforced.

Respondents/*Pennsylvania judges'* moved to be excused from filing a brief. Motion was granted by order issued several days after judicial brief was due.

Respondents/ *Self-employed plan participant, Law firm plans and plan trustees'* procedurally 'flawed' and untimely filing of an appellate brief was not construed against them.

Petitioner/*alternate payee's* timely Reply Brief, *citing* Exxon Mobile v. Saudi Basic, 125 S.Ct. 1517, 1521-22 (2005), in opposing *Rooker-Feldman* defenses was erroneously docketed 'untimely' when docketed by court order effective months after Reply arrived, just before panel issued an adverse order.

The court acknowledged that its *sua sponte* dismissal with prejudice was inconsistent with the liberality with which federal courts construe *Pro se* Complaints, permitting amendment not dismissal.

Lower courts failed to exercise jurisdiction to hear undisputed allegations that fiduciary and judicial respondents

violated provisions of child support and internal revenue statutes, by failing to comply with or to enforce ERISA disclosures in a state divorce action, at a loss to Petitioner/*alternate payee*- profit to Respondent/*self-employed participant-plan trustee.*

The appeal court rested on the district court's unsupported conclusion: "the factual allegations in Chajkowski's complaint amounted to nothing more than a collateral attack on the state court judgments rendered in connection with her divorce proceedings, and that application of the *Rooker-Feldman* Doctrine was required." The lower courts required no response to the complaint and no Exxon limitations were considered or applied to factual allegations. The appeal court did no plenary review of the record.

Petitioner/*alternate payee's Pro se* Complaint and Reply Brief, *citing* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S.Ct. 1517; 161 L.Ed. 2d 454 (2005) are substantively the components of "express belief and conflicting federal precedent," needed to satisfy LAR 35.1 requirements. No LAR 35.1 compliance request was made to *Pro se* Petitioner.

Respondents/*Pennsylvania judges* received an order to be excused after the due date for filing a response brief. Respondents/ *Self-employed ERISA plan participant, Law firm plans and plan trustees* received a follow-up letter 12/17/04, a telephone request for brief 03/05/05, and the untimely hard copies were docketed 03/17/05. None of which was construed adverse to the Respondents.

The Petition for *en banc* Rehearing was denied *sua sponte* by the Appeal Court, and published referring to LAR 34.1(a), in *bias* or procedural error.

U. S. Court of Appeal for the Third Circuit
July 5, 2005
Petitioner's June 20, 2005
Petition for Rehearing *'en banc'*
denied *'sua sponte'*.
June 6, 2005 Order– Certified July 13, 2005
Affirming November 2, 2005 order
Denying Reconsideration of district court's
'sua sponte' dismissal, with prejudice, of
Petitioner's suit for Declaratory Judgment,
October 20, 2005 Order not considered.

Petitioner's ERISA action was filed in federal court October 15, 2004 and *sua sponte* dismissed, with prejudice on October 20, 2005 by order of the district court. Reconsideration denied *sua sponte* November 2, 2005 and both orders appealed.

The district court's *sua sponte* orders are subject to differing standards of appellate review, as Dismiss is Plenary-Reconsider is abuse of discretion.

Appeal Court Order captions list Appellee identity errors made by the district court, corrected in paragraph 4, Plaintiff's Petition for Reconsideration.

The word "Appellee" is absent on the orders.

Petition for Rehearing *en banc* incorrectly printed as:
SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Appeal Court's July 5, 2005 order is confusing:

"The petition for rehearing *en banc*" filed by Appellant having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges in active service, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by court *en banc*, petition for rehearing *en banc* is denied."

Factual Summary

Bosicks married 04/06/74
Mary Ellen Chajkowski filed for divorce 07/02/97
Joseph Bosick granted *Bifurcation* Order 12/30/00

All economic claims were litigated in the Pennsylvania courts, including APL/child support. Petitioner believes there would have been no A~L award, thus no inequitable income tax burden, if the state courts had compelled timely *plan* disclosures and made timely distribution of assets.

Respondent/Bosick, self-employed lawyer and *plan* trustee, controlled all retirement and deferred income assets; Petitioner, elementary teacher 72-77, quit teaching to raise the parties' three children and was not employed outside home.

Pennsylvania courts excluded as 'mandatory' 401k contributions; rendered an unallocated support order taxable to Petitioner, failed to enforce its unallocated APL/support order 1998-2002, found Respondent/Bosick in contempt but failed to purge, denied petitions to modify support and retroactively modified APL/child support in 2002, adverse to Petitioner who paid income tax on the amount received 1998-2002. In November 2004, a hearing officer issued an order that Petitioner owes Bosick over $100, 519 in APL/child support over-payment, due to April 10, 2002 retroactive order to recalculate.

Pennsylvania appellate courts denied Petitioner's 2003 Petition to Supplement the record with evidence of undisclosed assets discovered after trial; yet inequitably granted Respondent's Petition to Supplement the record with evidence that real estate was sold for a higher price than its 1999 appraisal.

Pennsylvania appellate courts denied appeals by Petitioner that trial court orders are unsupported by substantial record evidence; issued contrary to record

evidence; erroneously excluded 401k contributions; and failed to award reasonable attorney fees.

The April 10, 2002 order awarding Petitioner $474,000 plan assets rests on a "counsel stipulation" valuing the *plan* assets admitted at trial April 4, 2001, without *plan* verification. Petitioner litigated based on limited *plan* knowledge and reposed her trust in counsel 1997-2002. The court permitted counsel to withdraw after 2001 stipulation and 2002 refusal to draft Petitioner's QDRO. Petitioner met with numerous attorneys who refused to represent her. Petitioner's second counsel advised her to accept the 2003 QDRO, then quit prior to 2003 appeal.

By a 2003 QDRO, qualified by the *plan*, Petitioner received over $100,000 less than the 2002 amount ordered April 10, 2002 by ED Order. Further, a share of Petitioner's *plan* assets were "frozen" by the order and remain in Respondents' control. Petitioner made written requests and court petitions for copies of *plan* statements. Fiduciary and judicial respondents failed to comply with or to enforce Petitioner's requests for *plan* statements.

Petitioner/*alternate payee's* undisputed allegations:

- Respondent/*Pennsylvania judges* failed to enforce discovery and rules on asset disclosure or to issue orders granting Petitioner/*alternate payee*'s motions to compel disclosure; as a result, federal statutory rights and responsibilities of the parties were abridged, in violation of the 14th Amendment.

-Respondent/*Self-employed plan participant, law firm plans and plan trustees* failed a fiduciary duty to make timely or supplemented *plan* disclosures to Petitioner/*alternate payee* in litigation 1997-2005.

-Respondent/*Self-employed plan participant, law firm plans and plan trustees* failed to make timely or supplemented ERISA *plan* disclosures to the court pursuant to a child support subpoena, a breach of fiduciary duty in

violation of state and federal law, including the14th Amendment.

-Respondent/*Pennsylvania judges* denied Petitioner/*alternate payee's* Motions/Appeals to purge Respondent/*Self-employed plan participant's* contempt, to compel discovery, including ERISA disclosures, and to modify the unallocated APL/child support orders to include all 401k contributions and tax obligations of the parties.

-Respondents/*Plan trustees,* their wives and Petitioner guaranteed *law firm* 1987 line of credit.

-Petitioner believes Respondent acted in bad faith to conceal significant *Plan* changes without notice.

-*Employer 401k* contributions were never included.

-Petitioner's 1997 equitable distribution claims were not heard at a meaningful time and manner, by an impartial tribunal, a due process violation.

-14th amendment violations unjustly deprived Petitioner of property; and enriched Respondents.

-Respondent/*Pennsylvania judges* reserved ERISA jurisdiction and granted Petition to *Bifurcate* the divorce from the economic claims, advanced by Respondent/*Self-employed plan participant-trustee* and ordered him to file an interim QDRO, which was never filed or enforced.

-Respondent/*Pennsylvania judges* entered a 2002 order based on a 2001 unsubstantiated lump sum "counsel stipulation", to distribute more than twenty years of pension/deferred income claims between the parties by 2003 QDRO at a loss of over $100,000.00.

- Respondent/*Pennsylvania judges* suspended APL as an unprecedented sanction for appealing the order.

-Respondent/*Pennsylvania judges* denied Petitioner's Petition to Supplement the record with evidence of undisclosed assets.

ARGUMENT SUMMARY

Respondent/*Pennsylvania judges* made inequitable, arbitrary and capricious applications of law, in violation of the Fourteenth Amendment. Inequitable treatment of the parties and failure to remedy errors on appeal constitute *bias* or error, which occasioned economic losses to Petitioner in favor of Respondent. Failure to exercise jurisdiction to enforce ERISA for *alternate payee* is *bias* or error.

Petitioner/*alternate payee* filed a *Pro se* ERISA claim against Respondents/*Self-employed plan participant, law firm plans, plan trustees and Pennsylvania judges* seeking a Declaratory Judgment, an order to compel ERISA disclosure, attorney fees, costs, sanctions, *per diem* statutory penalties and equitable relief. ERISA 'protected class' Petitioner alleges sufficient record evidence of fiduciary conflict and judicial *bias* to warrant a heightened standard of review. Pinto v. Reliance Standard Life Ins. Co., 214 F3d 377 (3d Cir. 2000). *Plan* assets at issue here include insurance, securities, trusts, real estate and corporate interests, all subject to statutory disclosure requirements in litigation.

Plan Respondents' undisputed breach of fiduciary duty and failure to fully comply with the laws governing discovery, asset disclosure and evidence occasioned unjust economic loss to Petitioner and enrichment to Respondents, in violation civil rules, ERISA, child support, divorce code and tax code statutes. The state and federal courts' undisputed failure to enforce the same constituted a violation of the 14th Amendment.

If district courts have no jurisdiction to enforce undisputed allegations that fiduciary and judicial Respondents' breached statutory duties in violation of the 14th Amendment; then, Declaratory Judgment where jurisdiction lies was warranted here, not dismissal.

The lower courts required no litigant disclosure; screened no conflicts; and issued no Declaratory Judgment,

favorable or adverse. Rules intended to screen conflicts protect the integrity of the courts, litigant due process, and the interests of the public. Disclosure is a Notice requirement at the outset of litigation, to ensure a fair and impartial tribunal, encompassing courts and counsel alike.

Fiduciary and judicial respondents' undisputed failure to comply with ERISA or to enforce timely disclosure interfered with Petitioner*'s* right to claim an equitable interest in marital assets accrued over more than two decades.

Undisclosed conflict may have compromised *alternate payee's* right to be heard at a meaningful time, a meaningful manner, before fair and impartial tribunals, where lower federal courts failed to enforce litigant disclosure rules and screened no conflicts.

Petitioner/*alternate payee's* litigation may have been burdened by undisclosed conflicts of interest in state courts, where litigant disclosures are not required to screen conflicts between attorneys and judges at the outset of litigation.

The counsel stipulation, p. 23 of Appendix I, indicates that counsel for the parties in divorce are members of P.C. law firms. The trial court admitted and relied upon the unverified *plan* evidence submitted on the first day of trial, not in a pre-trial statement, sealed the record and permitted Petitioner's counsel to withdraw appearance after refusing to draft a QDRO based on the averments made by stipulation.

Trial counsel and Respondents failed to incorporate Petitioner/*alternate payee's* testimonial evidence of loans made against interests in American Bar Association Members Retirement Programs. The fact that *plan* loans were available to Bosick to pay child support arrears 1998-2002 was known to the *plan trustees,* to counsel and to judicial Respondents, in their capacity as officers of the court. Fiduciary *plan* Respondents' never disclosed *plan* information regarding *alternate payee's* equitable interest in the American Bar Association Members Retirement Program and successor *plans,* which judicial respondents failed to enforce.

Fiduciary and judicial Respondents must be charged with actual and constructive notice of the parties' ERISA rights and responsibilities *ab initio* and payment of *per diem* penalties and sanctions, as Petitioner had no control over the prolonged lapses between Petitioner's timely filed appeals and state court decisions and orders.

The state courts' failure to enforce ERISA and child support disclosures constituted violations within the jurisdiction of federal district courts. Exclusion of 401k contributions from child support orders is a facial error on the record, which state appellate courts failed to correct. Therefore, failure to purge APL/child support arrears 1998-2002 and Ordering retroactive APL modification adverse to Petitioner was a capricious abuse of discretion.

While state and federal courts may have "concurrent jurisdiction" over ERISA claims litigated in divorce, Petitioner's undisputed allegation that the state courts failed to enforce the parties' ERISA rights and responsibilities constituted a violation of the Act. Suits for violation of federal statutes can be brought in any district court of the United States having jurisdiction over the parties.

The appeal court specifically acknowledged that Petitioner/*alternate payee* was represented by counsel at all times and, in *bias* or error, applied the *Rooker-Feldman* waiver of jurisdiction, a decision inconsistent with Moore, and contrary to the Exxon limitations of the doctrine.

Plenary appellate review of the record would show that the issues pled in the Complaint were not correctly decided as a matter of law, as no disclosures were enforced; no Answer, no Motion to Dismiss, no Judicial Brief were filed by Respondents; and the Complaint allegations were not construed in favor of Petitioner. The district court's *sua sponte* dismissal with prejudice is a reversible legal error.

"In the procedural context of a Motion to Dismiss, we accept the factual allegations contained in the Amendment Complaint as true and plaintiff receives the benefit of all reasonable inferences to be drawn therefrom. *See* Angelastro

v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). We may not affirm the dismissal of the complaint unless plaintiffs can prove no set of facts that would entitle them to relief. City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 41, 45-46, (1957). Respondents filed no denials of complaint allegations and no objection to dismissal. The district court failed to address Petitioner's undisputed record losses of over $100,000.00 on Reconsideration, which constituted an 'arbitrary and capricious' abuse of discretion and a violation of the 14th Amendment.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id. State and federal courts' failure to enforce ERISA occasioned economic losses to Petitioner/*alternate payee*.

Appellate construction adverse to Petitioner, acknowledging material omissions of counsel in state courts yet applying *Rooker-Feldman*, knowingly affirmed judicial error without due process, and constituted an inequitable exercise of jurisdiction inconsistent with United States v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where "fundamental unfairness" supported by FRE 404(b) "plain error" evidence was reversed and remanded.

Exxon Mobil Corp. v. Saudi Basic Industries Corp. 125 S. Ct. 1517, 1521-22 (2005), is controlling authority, defining limits to application of *Rooker-Feldman* doctrine.

ARGUMENT

I. The Court of Appeals, in *bias* or error, applied *Rooker-Feldman* to affirm a *sua sponte* dismissal of undisputed allegations that fiduciary and judicial failure to comply with or to enforce ERISA caused losses to Petitioner/*alternate payee,* contrary to limitations of the doctrine set forth by this court and *bias* inconsistent with third circuit decisions.

a) Limitations of Jurisdictional Waiver

Under the *Rooker-Feldman* doctrine, federal district courts may not hear cases that are meant solely as a collateral attack of fully litigated state court judgments. However, federal jurisdiction over an action does not terminate automatically upon entry of judgment in the state court. Instead, if a party presents in federal court an independent claim, even though it may deny a legal conclusion a state court has reached in a previous action to which that party was also a party, then there is jurisdiction, and state law determines how preclusion would apply. Exxon Mobil Corp. v. Saudi Basic Industries Corp, 125 S. Ct. 1517, 1521(2005).

The United States Court of Appeals for the Third Circuit failed to incorporate important aspects of this Court's decision in Exxon Mobil. They addressed the part of the Court's Opinion upholding *Rooker-Feldman,* but ignored the limitation of the doctrine.

Although this action followed the state divorce action and raised a facet addressed in the state court litigation, this case presents an independent federal question under ERISA: the duty to disclose ERISA assets to a former spouse, and the state judicial system's duty to enforce Petitioner's rights under ERISA and under the Constitution. Petitioner's federal claim is not an "insurance policy," as the *Rooker-Feldman*

doctrine was enunciated to curtail; rather, it is Petitioner's statutory means of exercising her right to *plan* information in Respondents control, pursuant to the civil enforcement provision of ERISA, which the state courts declined to do. Moreover, the federal action involves additional parties and actions by judicial Respondents that constitute a systematic denial of Petitioner's federal and constitutional rights, which make this claim distinct from the state action that preceded it.

b) Inconsistent *bias* in application of the law.

The lower courts exhibited *bias* by inequitably failing to construe undisputed factual allegations in Petitioner's favor and by entering *sua sponte* orders to bar Petitioner's suit for a Declaratory Judgment, knowing that state courts failed to enforce Petitioner's rights under ERISA.

Petitioner's filed suit for Declaratory Judgment to enforce an ERISA claim, in her capacity as a 'protected person' under the statute, yet the lower courts failed to apply a *strict scrutiny* standard of review.

Petitioner alleged sufficient record evidence of fiduciary conflict and judicial *bias* to warrant a heightened standard of review. Pinto v. Reliance Standard Life Ins. Co., 214 F3d 377 (3d Cir. 2000), which the federal courts ignored.

The appeal court's decision to affirm a *sua sponte* application of *Rooker-Feldman* doctrine to bar Petitioner's undisputed ERISA claim is inconsistent with its decision in Parkview Associates v. City of Lebanon, D.C. No. 98 cv 455 (3d Cir. 2000), where the appeal court applied federal jurisdiction, over objection, to hear a developer's claims not raised in prior zoning litigation. The parties in Parkview were not a protected class and the Appellant's issues did not involve a bundle of statutory rights, as in the instant action.

In United States v. Moore, M.D. No. 03-2698 (3d Cir. 2004), an appeal court decision "intertwined with a state judgment" the court intervened where the defendant's counsel did not and the trial court was silent. To correct a

finding of "fundamental unfairness" the court applied the 'plain error' federal rule of evidence 404(b) to rein in state action construed to be "highly prejudicial" to a criminal defendant at the sentencing stage, reversing a jury conviction. Here, the court acknowledged the failure of counsel, yet, Appellant, a protected class member in an action involving a bundle of statutory rights and responsibilities, was subject to disparate treatment. In *bias* or error, the appeal court here elected to apply the *Rooker-Feldman* doctrine to waive jurisdiction.

Rules of procedure and evidence must be neutrally applied to civil litigants, where judicial enforcement of federal law incorporates a bundle of statutory rights and responsibilities between parties that are subject to civil penalty and sanctions. Petitioner here was prejudiced by undisputed state court errors, *inter alia,* including:

- finding Bosick $49,935 in arrears (01/04/99) and assessing **$0.00** monthly payment on arrears;
- stating that medical benefits were not considered;
- excluding 401k contributions;
- retroactively modifying APL/child support;
- admitting and relying on *hearsay* evidence
- unverified by the *plan,* on the first day of trial;
- failure to permit Petitioner to supplement
- evidence of undisclosed assets in 2003;
- failure to compel requests for *plan* statements;
- entering a QDRO on **vested** *plan* assets only;
- freezing *plan* assets in Respondents' control;
- allocating an unnamed **remainder** to Respondent in the equitable distribution order;
- failure to enforce the law or the *Bifurcation* order.

The United States Court of Appeals for the Third Circuit did no plenary review to determine whether the District Court had correctly applied governing federal law. Petitioner's federal action should not have been barred.

II. The district courts have jurisdiction to hear a suit for Declaratory Judgment to enforce ERISA component of a divorce action where a *bifurcation* order reserved jurisdiction over Petitioner's statutory rights, which state courts failed to enforce.

A. Petitioner's Federal Question should not have been precluded.

In a federal action following a state court action, the state court judgment is not given preclusive effect when the party against whom the decision is rendered did not have a full and fair opportunity to litigate the claim or issue in state court. Haring v. Prosise, 462 U.S. 306 (1983).

While Petitioner raised the issue of Respondent's pension assets in seeking equitable distribution during Petitioner's 1997 divorce action, the state court granted Bosick's 2000 petition to *bifurcate* the economic claims and issued an order requiring Bosick to enter an interim qualified domestic relations order incorporating Petitioner/*alternate payee*'s right to Bosick's pension assets. Bosick never entered an interim QDRO; moreover, the trial court never enforced its *bifurcation* order.

The state appellate courts did not enforce the *bifurcation* order. The state courts inequitably denied Petitioner's appeal to supplement record evidence of undisclosed assets in Respondent's control, discovered after trial; and granted Respondent's petition to supplement record evidence that a property sold for more than its stale appraisal.

Petitioner's federal action arose out of the prolonged withholding of information by Bosick and his firm, and lack of enforcement by the state courts. Petitioner is entitled to this information under the Employee Retirement Income Security Act. The failure of Respondents to perform their respective duties under ERISA caused Petitioner to be inequitably denied proper equitable distribution of marital

assets, including Respondent Bosick's pension assets under his firm's Salary Reduction pension *plans*. It also precipitated this suit for Declaratory Judgment.

Respondents' violations of Petitioner's federal rights were never addressed by the state action; where Petitioner's ERISA rights were ostensibly preserved by the trial court's *bifurcation* order directing Bosick to enter an interim qualified domestic relations order and never implemented or enforced by Respondents/*Pennsylvania judges*.

Petitioner's federal suit arose out of distinct circumstances from those determined during Petitioner and Bosick's divorce action. The parties are distinct. The issues are distinct in that the federal action involves federally protected rights, while the state action issues involved the distribution of marital property. The federal action issues included breach of fiduciary duty, due process and judicial enforcement of spousal rights at the dissolution of the marriage under ERISA.

B. Petitioner's Claim is appropriate for declaratory relief.

A case is ripe for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. s2201 where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 506, 32 L.Ed. 2d 257, 92 S.Ct. 1749 (1972) *quoting* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L.Ed. 826, 61 S.Ct. 510 (1941).

Petitioner's suit invokes judicial enforcement of the parties' rights and responsibilities defined by ERISA:

The state courts' failure to enforce Petitioner's statutory right to Respondents' full disclosure of assets, including retirement and deferred income *plan* assets, pursuant to orders for equitable distribution of assets, constituted ERISA and 14th Amendment violations, within federal jurisdiction.

State and federal courts' "concurrent jurisdiction" over ERISA claims, litigated in divorce, must be construed in light of Petitioner's undisputed allegation that the state courts failure to enforce the parties' rights and responsibilities constituted a violation of ERISA. The congressional purpose of the civil enforcement provision was to encourage judicial enforcement of ERISA. Suits for violation of federal statutes can be brought in any district court of the United States having jurisdiction over the parties. United Automobile v. Textron, D.C. Civ. No. 95-cv-01918 (3d Cir. 1997). Here, the court entered no Declaratory Judgment, favorable or adverse. ERISA rights and responsibilities regarding *plan* disclosures to a *plan beneficiary* are a routine compliance issue; as exercising one's right to *plan* disclosures is not statutorily limited to divorce proceedings, nor is Petitioner's ERISA right to request *plan* disclosure limited to litigation.

Respondents/*Plan participant and law firm plans* enjoyed decades of tax deferred growth and IRS tax returns reported separately from joint returns, outside the knowledge and control of Petitioner, whose losses, over $100,000.00, controlled by Respondent/ *plan participant, law firm plans and plan trustees* are unsupported by evidence of any kind.

ERISA non-compliance penalties are statutory and sanctions are within the discretion of courts exercising jurisdiction. Therefore, Declaratory Judgment is the least restrictive and most efficient way to exercise jurisdiction to redress Respondent(s) ERISA violations, including the state courts failure to enforce the rights and responsibilities of parties litigating equitable distribution of *plan* assets.

III. The lower federal courts inequitably violated Petitioner's due process right to ERISA enforcement.

Under the Fourteenth Amendment, due process mandates that once a state has created rights or benefits, these benefits may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. Id.

Since its inception, this case and the prior divorce action have been riddled with unfair and inequitable exercise of judicial authority over Petitioner's claims.

Petitioner has been denied her rights at every stage of this litigation as well as during the prior state action. Particularly, Petitioner has not received due process of law when the courts performed four actions:

a) Failed to enforce litigant disclosures under the Federal Rules of Civil Procedure.

Petitioner reasonably believes that failure to compel litigant disclosures compromises the court's neutrality where conflicts have not been screened. This is especially true

where Petitioner has experienced systematic prejudicial treatment by the courts.

This United States Court of Appeals failed to fully consider and incorporate "limitations" of the *Rooker-Feldman* doctrine Exxon Mobil Corp. v. Saudi Basic Industries Corp, 125 S. Ct. 1517, 1521-22 (2005), it violated Petitioner/*alternate payee*'s right to due process on undisputed Complaint allegations that fiduciary respondents failed to comply with statutory law and judicial respondents failed to enforce statutory law, a 14th Amendment violation.

This appeal court's application of *Rooker-Feldman* doctrine to dismiss an ERISA suit for Declaratory Judgment was inconsistent with its decision in Parkview Associates v. City of Lebanon, D.C. No. 98 cv 00455 (3d Cir. 2000), where it applied federal jurisdiction to hear a developer's claims not raised under state zoning jurisdiction, where this appeal court chose not to apply *Rooker-Feldman* waiver of jurisdiction.

The lower federal courts erred by dismissing Petitioner's undisputed allegations that state courts failed to equitably enforce due process and full disclosure in 1997 divorce litigation, where it is undisputed that state courts:

1) Failed to enforce a 2000 *Bifurcation* Order;

2) Accepted an unverified 2001 "counsel stipulation" as trial evidence valuing more than twenty years of retirement and undistributed income assets within the custody and control of Respondents;

3) Waited one full year to rule in 2002 on the "Counsel Stipulation" evidence;

4) Issued a 2003 QDRO in substantive and facial error, where it accepted unsupported losses in valuation and granted Respondent's petition to

freeze $24,239.00 and $44,457.00 amounts of Petitioner's share, which remain in his control.

5) Retroactively modified, 1998-2002, the unallocated APL/ child support order adverse to Petitioner, whose income tax obligation was assessed and paid on the full amount received.

6) Suspended Petitioner's APL as a sanction for appealing the equitable distribution order.

The appeal court's application of *Rooker-Feldman* doctrine to this set of facts is contrary to its decision in United States of America v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where the appeal court intervened in the interest of "fundamental fairness" finding that a criminal conviction rested on "plain error" evidence, in violation of FRE 404(b), and reversed and remanded at the sentencing stage based on statements of the prosecutor, where defense counsel and the court failed to intervene. Civil enforcement of federal statutes and due process are at issue here, where the state courts failed to exercise "concurrent jurisdiction" over the federal claims, in violation of the 14th Amendment.

The trial court granted Respondent(s), petition to freeze a portion of Petitioner's *plan* funds, issuing a QDRO in April 2003, based on a two year old "counsel stipulation" of value, knowing that Petitioner's counsel refused to draft a QDRO and permitted that counsel to withdraw appearance to prejudice of Petitioner.

State courts inequitably denied Petitioner's motions to compel production of *plan* statements to support the values reported from "counsel stipulation" in 2001 to 2003 QDRO, of assets within Respondents' custody and control.

The state appellate courts permitted Bosick to supplement readily available evidence on the sale of real estate and inequitably denied Chajkowski's petition to

supplement the record with evidence within Bosick's custody and control of undisclosed assets, discovered after trial.

The issues pled in the Complaint were not denied by Respondents; and not correctly decided as a matter of law. Disclosure of *plan* information upon written request by *plan beneficiaries*; or by operation of law under the rules of civil procedure, is a statutory duty of Respondent(s)/*plan participant, law firm plans and plan trustees.* ERISA Civil enforcement preempts application of the *Rooker-Feldman* waiver of federal jurisdiction, a due process component of Petitioner/*plan beneficiary*'s claim and the implications of Respondent(s) 'duty' and failure to deny material allegations.

Fiduciary and Judicial Respondent(s) must be charged with actual and constructive knowledge that Chajkowski's 'equitable interest' in the assets of Bosick's *law firm plans* are subject to ERISA express disclosure provisions, intended by Congress to protect the Petitioner/*plan beneficiary*'s right to claim or secure her property interest. The courts' failure to enforce ERISA rights and responsibilities of the parties is a violation of the Fourteenth Amendment.

b) *Sua sponte* dismissed Petitioner's claim with prejudice, without any action from Respondents;

Respondents filed no denials of complaint allegations. The lower federal courts failed to construe factual allegations in favor of Petitioner, impermissible *bias* or reversible error.

The appeal court granted judicial respondents motion to be excused from filing a brief after the due date, which was not construed against respondents.

The district court failed to address Petitioner's undisputed record losses of $100,000.00 on Reconsideration, which constituted an 'arbitrary and capricious' abuse of discretion and a violation of the 14th Amendment, which the Appeal Court affirmed *sua sponte*, inconsistent with its own decisions and contrary to controlling authority in Exxon.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id.

The state and lower federal courts' failure to enforce ERISA occasioned unjust economic losses to Petitioner, impermissible *bias* or error. Appeal Court construction adverse to Petitioner, acknowledging material omissions of counsel in state courts yet applying *Rooker-Feldman* waiver of federal jurisdiction over Petitioner's suit for Declaratory Judgment effectively affirmed court error in adjudicating Petitioner's federal rights without due process, and constituted an inequitable exercise of appellate jurisdiction inconsistent with United States of America v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where this appeal court chose not to apply *Rooker-Feldman* waiver of federal jurisdiction, holding that "fundamental unfairness" to a criminal defendant was supported by "plain error" evidence, FRE 404(b). In Moore, the Appeal Court invoked federal jurisdiction to reverse and remand a 'guns and arson' jury conviction at the sentencing stage, despite inaction on the part of defense counsel to object or trial court to intervene.

Here, allegations are undisputed that *alternate payee's* statutory rights were violated by *plan* respondents and by judicial respondents' failure to enforce statutory law, in violation of the 14th amendment. Therefore, a *sua sponte* denial of Rehearing *en banc* violated the 14th Amendment.

The lower courts failed to incorporate the standard for Dismissal, and controlling authority of this court in Exxon.

Exxon Mobil Corp. v. Saudi Basic Industries Corp. 125 S. Ct. 1517, 1521-22 (2005), is controlling authority, defining limits to *Rooker-Feldman* waiver of jurisdiction, as failure to enforce ERISA violated the 14th Amendment, as Petitioner's undisputed Complaint asserted and the federal record here demonstrates. The appeal court order/decision exercises jurisdictional waiver in *bias* or error here.

c) Failed to consider undisputed state court errors.

Declaratory Judgment is an equitable way to exercise civil jurisdiction to redress Petitioner's undisputed complaint allegations that Respondents' ERISA violations in state court constituted a violation of the 14th Amendment within the jurisdiction of the district court.

Two judges elected to recuse themselves from this divorce action after Bosick's motion for a new judge was granted and Respondent judge Max Baer went first to the civil division and later to the Pennsylvania Supreme Court.

The parties' counsel and Respondent/*Pennsylvania judges* have an ethical duty to recuse when there is a conflict. Without full disclosure, it is unclear why the litigation yielded such an unfair result. There are facial errors that the appellate courts failed to correct. For example, the $474,000 awarded in 2002 is not 60% of the total listed by 2001 trial evidence counsel stipulation; nor was $474,000 awarded by 2003 QDRO, qualified by the *plan*.

Petitioner/*alternate payee's* claim to compel *plan* statements and documents and to assess statutory penalties is reasonable, under the circumstances.

The lower federal court's *sua sponte* Orders dismissed Petitioner's undisputed, un-litigated claim that fiduciary violations and judicial failure to enforce ERISA, constituted a 14th amendment violation, within federal jurisdiction to remedy. Therefore, waiver of federal jurisdiction, here, is a Fourteenth Amendment violation.

d) Failed to entertain an appeal of Petitioner's claim.

State appellate courts failed to address Petitioner's claim that APL/child support and equitable distribution orders were entered without substantial evidence or contrary to the evidence. *Plan* assets were valued by counsel stipulation, which Petitioner did not fully comprehend. Two years later, the QDRO was entered at a loss without *plan* verification.

-April 4, 2001 *plan* values admitted and relied upon as trial evidence by "counsel stipulation"-never litigated.

-April 10, 2002 court order awarding $474,000.00 from *law firm plans* to Petitioner/*plan beneficiary*, awarding an unvalued "remainder" to Respondent(s)/*Self-employed plan participant*; the *law firm plans'* distribution unsupported by substantial evidence, as "Counsel Stipulation" was an unverified *hearsay* document, never litigated;

-August 2002, Petitioner's 1997-2002, Petitioner's divorce counsel from inception of litigation, refused to draft Petitioner's QDRO and withdrew her appearance, with the court's permission.

-April 2003 QDRO, Petitioner realizing a $100,000.00 unsubstantiated loss with the court granting Respondent's petition to 'freeze and control' a portion of Petitioner's share of funds; inequitably denying Petitioner's request for *plan* statements to verify *plan* values.

Petitioner's undisputed allegation that state appellate courts inequitably permitted Respondent to supplement the record and denied Petitioner to supplement the record with evidence of undisclosed assets was never given appeal.

The appeal court failed to do a plenary review of the record to determine whether the district court correctly

applied the law and abused its discretion by a *sua sponte* denial of petition for rehearing *en banc*.

The appeal court's treatment of Petitioner's ERISA claim is inconsistent with its decision in Moore, where the appeal court exercised jurisdiction after acknowledging a criminal defendant's ineffective counsel and the court's admission of FRE 404(b) plain error evidence. The procedural treatment of Petitioner's suit and failure to fully consider Exxon, raised by Petitioner's Reply Brief, is reversible *bias* or error.

IV. ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY TO JUDICIAL RESPONDENTS.

Under the Eleventh Amendment, states are granted sovereign immunity from suits by citizens of other states, foreign states, and their own state. U.S. Const. Amend XI. This immunity does not extend to government agents or officials acting in that capacity where a due process violation is alleged and where the state has consented. *See* Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).

Petitioner/*alternate payee's* allegation, that her right to due process, violated by Respondents' failure to comply with or to enforce the law, including civil rules/ divorce code/ child support/ ERISA/ tax code statutes and the *Bifurcation* Order, undisputed by Respondents is a 14th Amendment violation, which warrant statutory sanctions. Therefore, the lower federal courts, by waiving jurisdiction over Petitioner's claim, consented to undisputed 14th Amendment violations.

The Pennsylvania Judges, Judicial Respondents in this matter, acted in their capacity as judges. They are not, in themselves, the "state" as protected by the Eleventh Amendment. Judicial Respondents denied Petitioner's due process rights by inequitably refusing to enforce full disclosure and consideration of Respondent Bosick's

retirement assets, to which Petitioner was entitled part. Finally, the Judicial Respondents did not raise Eleventh Amendment immunity, and the Federal District Court did not take it into consideration in its dismissal of the case, as the opinion accompanying the decision does not discuss the Eleventh Amendment as a reason for its dismissal. Thus, Judicial Respondents can be deemed to have consented. Therefore, the Eleventh Amendment does not apply to Judicial Respondents in the instant matter.

CONCLUSION

WHEREAS, this federal action involves *plan* assets that include, insurance, securities, trusts, real estate and corporate interests, where breach of fiduciary duty is undisputed, due process violations of statutory spousal rights at the dissolution of marriage under ERISA and *Bifurcation* Order and judicial failure to enforce the same are undisputed, this case involves important questions of constitutional and federal law. Further, this case addresses an inconsistent and inequitable application of this Honorable Court's decision in Exxon Mobil, and because this case implicates important questions regarding equal protection and due process under the Fourteenth Amendment, Petitioner respectfully requests that this Honorable Court Grant a Writ of Certiorari.

Respectfully submitted,

_____

Mary Ellen Chajkowski,
Petitioner *Pro Se*

September 22, 2005

(3)

FILED

05-419 SEP 29 2005

OFFICE OF THE CLERK

APPENDIX I
ORDERS AND OPINIONS

No. _____

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI *Pro se,*
Petitioner/alternate payee,

v.

JOSEPH J. BOSICK, *et al.*,
Respondent/self-employed plan participant and trustee,
Law firm employer- plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

Mary Ellen Chajkowski *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

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Statutes Conferring Jurisdiction

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. ... 28 U.S.C. § 1254 (1988).

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY ELLEN CHAJKOWSKI, *Pro se*

Plaintiff **No. 04-cv-1582**

v.

JOSEPH BOSICK, *et al.*,

Defendants

Order of Court

AND NOW, this 20th day of October, 2004, for the reasons set forth in the accompanying *Memorandum* Opinion, IT IS HEREBY ORDERED that plaintiff's complaint and action is **DISMISSED** with prejudice. The Clerk of Court is directed to mark this case closed.

/s/Arthur J. Schwab,
United States District Judge

MEMORANDUM OPINION

Pro se plaintiff, Mary Ellen Chajkowski, filed a complaint against Joseph Bosick, and other members of his law firm, as well as the Chief Justice of the Supreme Court of Pennsylvania and certain other judges on the Superior Court of Pennsylvania. In her complaint, plaintiff broadly asserts that defendant Bosick and his law firm failed to make "timely disclosures" to plaintiff during her 1997 divorce action and filed an "incomplete inventory" of her ex-husband's 401k benefits. She also alleges that numerous state court judges at the trial and appellate levels arbitrarily and inequitably applied the law in favor of her ex-husband in divorce.

Although plaintiff alleges her complaint is based upon violations of ERISA and other "constitutional questions," the factual allegations amount to nothing more than a collateral attack on the state court judgments. This "Cause of Action" therefore raises insurmountable *Rooker-Feldman* hurdles. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The *Rooker-Feldman* doctrine is a question of federal subject matter jurisdiction that this Court is not free to ignore. Gulla v. North Strabane Township, 146 F.3d 168, 170-71 (3d Cir. 1998). "Under the *Rooker-Feldman* doctrine, lower federal courts cannot entertain [federal] claims that have been previously adjudicated in the state court or that are inextricably intertwined with a state adjudication." FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). Moreover, the state level decision need not be of its highest court, and the *Rooker-Feldman* doctrine applies equally to final decisions of lower state courts. Exxon Mobil Corp. v. Saudi Basic Industries Corp., 364 F.3d 102, 104 (3d Cir. 2004), citing Focus, 75 F.3d at 840.

Given the liberality with which federal courts construe *pro se* complaints, this Court would ordinarily give plaintiff an opportunity to amend her complaint or to show cause why this action should not be dismissed for want of subject matter jurisdiction. However, plaintiff's affirmative averments demonstrate that, even if her complaint could be read to sustain a federal question or diversity of citizenship jurisdiction, her cause of action is a "spin-off" of a state court action, that it suffers a fatal *Rooker-Feldman* defect, and that it must, therefore be dismissed with prejudice.

An appropriate order will be entered.

/s/Arthur J. Schwab,
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY ELLEN CHAJKOWSKI ***Pro se,***

Plaintiff, **No. 04-cv-1582**

v.

JOSEPH BOSICK, ***et al,***

Defendants.

ORDER

AND NOW, this 2nd day of November, 2004, IT IS HEREBY ORDERED that plaintiff's request for Reconsideration (doc. no. 15) is DENIED.

/s/ Arthur J. Schwab
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI,
Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

ORDER

March 3, 2005

Sloviter, Authoring Judge, and Nygaard, Circuit Judges

The foregoing motion by the Judicial Appellees to be excused from filing a brief is granted without prejudice to any decision by the merits panel to request that the Judicial Appellees file a brief.[1]

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[1] Appeal Court Order issued after Judicial Appellee Brief was due in response to the 12/20/04 Briefing Notice issued to the parties.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,
v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

JUDGMENT Dated June 6, 2000

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania. On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on November 2, 2004 be, and the same is, hereby affirmed. Costs taxed against appellant. All of the above in accordance with the Opinion of this Court. ATTEST: /s/ Marcia M. Waldron, Clerk

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

Submitted Under Third Circuit LAR 34.1(a)-June 6, 2005
Before:
SLOVITER, BARRY and FISHER, Circuit Judges.
(Filed June 6, 2005)

OPINION

PER CURIAM

Appellant, Mary Ellen Chajkowski, appeals from the District Court's order dismissing her complaint for lack of subject matter jurisdiction and its subsequent order denying her motion for reconsideration. We have jurisdiction to review the final decision of the District Court under 28 U.S.C. § 1291. We exercise plenary review of a dismissal for lack of subject matter jurisdiction, *see U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 331 (3d Cir.2005), and review the denial of a motion for reconsideration for an abuse of discretion. *See Le v. Univ. of Pennsylvania.*, 321 F.3d 403, 405-06 (3d Cir.2003). For essentially the reasons given by the District Court, we will affirm.

In October 2004, Chajkowski brought a civil action in the United States District Court for the Western District of Pennsylvania purportedly raising "constitutional questions" and asserting ERISA claims against ex-husband Bosick, Bosick's law firm, trustees of the firm's Salary Reduction Profit Sharing Plan, and numerous judges of the Superior and Supreme Courts of Pennsylvania as well as the Court of Common Pleas of Allegheny County. Basically, Chajkowski alleged that the state courts erred in accepting the values of her ex-husband's ERISA assets--values that had been stipulated to by her attorney--and in using those values to render (and uphold on appeal) an equitable distribution order of the marital estate, and in failing to timely enforce its own "Bifurcation Order." Chajkowski sought declaratory and injunctive relief, as well as monetary damages.

In an order entered on October 21, 2004, the District Court concluded that the factual allegations in Chajkowski's

complaint amounted to nothing more than a collateral attack on the state court judgements rendered in connection with her divorce proceedings, and that dismissal of the complaint on the basis of the *Rooker-Feldman* doctrine was required. [FN1] While recognizing that a *pro se* plaintiff would ordinarily be afforded an opportunity to amend the complaint or show cause why the action should not be dismissed for lack of jurisdiction, the District Court determined that such action would be futile in the instant case given the "fatal *Rooker-Feldman* defect." The District Court likewise concluded that Chajkowski failed to demonstrate that reconsideration of its dismissal decision was warranted, and an order was thus entered on November 2, 2004, denying her motion filed pursuant to Fed.R.Civ.P. 59(e). This timely appeal followed.

> FN1. The *Rooker-Feldman* doctrine embodies the principles set forth by the Supreme Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Under the *Rooker-Feldman* doctrine, lower federal courts cannot entertain constitutional claims that are inextricably intertwined with a state adjudication. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996). A federal claim is inextricably intertwined with a prior state adjudication if:

the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling.... If the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the District Court has no subject matter jurisdiction to hear the suit.

FOCUS, 75 F.3d at 840 (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir.1995)). Moreover, a District Court does not have jurisdiction over "challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *See Feldman*, 460 U.S. at 486, 103 S.Ct. 1303.

Upon careful review of the record, we agree with the District Court that it lacked jurisdiction to review Chajkowski's complaint. As appellees correctly assert, Chajkowski was afforded the opportunity to litigate the claims set forth in her complaint in the state courts, and indeed she did so with the help of counsel through two complete rounds of appeals. Granting her the requested relief would be the equivalent of allowing her to use the federal courts as a forum to appeal a state court judgment and falls squarely within the *Rooker-Feldman* doctrine, which applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the District Court proceedings commenced and inviting District Court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, --- U.S. ----, 125 S.Ct. 1517, 1521-22, 161 L.Ed.2d 454 (2005).

We further reject as meritless Chajkowski's contention that this case somehow falls within an exception to the *Rooker-Feldman* bar because the state court judgment was rendered "nonfinal" as a result of the state court's failure to enforce its bifurcation order, and dispose of it without further discussion. Finally, Chajkowski's reliance on *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293 (6th Cir.2005), is misplaced as *Rooker-Feldman* was found not applicable in that case simply because the doctrine "does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." *Id.* at 297, *quoting*

United States v. Owens, 54 F.3d 271, 274 (6th Cir.1995). As noted, not only was Chajkowski a party to the state court actions she challenges, she was represented by counsel throughout and offers nothing to support her assertion that due process considerations take this case outside the reach of *Rooker-Feldman*.

Accordingly, for the above reasons, we will affirm the District Court's orders dismissing Chajkowski's complaint and denying her motion for reconsideration.

ORDER TO BE REVIEWED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: July 5, 2005
RLS/cc: MEC
MEB
ASP

Re: STATE COURT ORDERS

Pennsylvania Divorce Action
Filed: July 2, 1997
FD 97-009496-006

***Bifurcation*/ Stipulation/ QDRO**
2000 2001 2003

Pretrial Order
November 1, 2000

***Bifurcation* Order**
December 26, 2000

Divorce Decree
December 29, 2000

Counsel Stipulation
April 4, 2001

QDRO
February 25, 2003

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, No. FD 97-9496
Plaintiff

v.

JOSEPH J. BOSICK,
Defendant

ORDER OF COURT

AND NOW, this 1st day of November 2000, following conciliation with counsel for the parties, it is hereby ORDERED, ADJUDGED AND DECREED that this matter is scheduled for a two day trial on the parties' claims regarding equitable distribution of marital property, alimony and/or counsel fees before the undersigned on the 6th and 7th day of February 2001 at 9:30 a.m. in Room 4013.

It is ORDERED that:

1. The parties are to enter into comprehensive stipulations concerning their assets within 45 days, copies of which are to be served upon the undersigned.
2. All discovery shall be completed 30 days prior to the trial date, hereinafter referred to as the "completion date". Any discovery requests, including submitting interrogatories, serving notices which schedule depositions, making request for admissions, and making requests for the productions of documents, shall be made at least 30 days prior to the completion date. In lieu of responding to any untimely discovery request, within 10 days of an untimely request, a party may file and serve an objection on the grounds that the request is untimely. The completion date for making a discovery request may be extended only by

written agreement of the parties which extends the completion date to a specified time or by order of court entered prior to the completion date.

3. No later than 15 days after completion date, the parties to the proceeding shall file and serve pre-trial statements. The pretrial statement shall include the following matters:
    a. The name of each person whom the party intends to call at trial as witness, including expert witnesses. The party shall also attach to the pretrial statement a report of each expert witness listed in the pretrial statement. This report shall describe the witness's qualifications and experience and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The testimony of any person who is not identified in a timely filed pretrial statement shall be excluded at trial. The testimony of an expert witness may not be inconsistent with or go beyond the fair scope of his or her report.
    b. A list of all the exhibits which the party expects to offer in evidence, containing an identifying mark for the exhibit. Any exhibits that do not exceed three pages shall be attached to the pretrial statement, and all exhibits not attached to the pretrial statement shall be described. Only documents or other writing listed in the pretrial statement may be offered in evidence at trial except as rebuttal evidence. All exhibits shall be available for inspection by any opposing party at any time after the filing of the pretrial statement.
    c. The party's gross income, each payroll deduction, and the party's net income, if the party intends to offer any testimony as to his

other income. If these items are reported on an annual basis, these items shall be listed for the past three years. If these items are reported on a weekly, bi-weekly, twice per month, or monthly basis, these items shall be listed for the past six pay periods.

d. A current expense statement in the form required by the practice and procedures governing an action in support if the party intends to offer any testimony as to his or her expenses.

e. If there is a dispute over the value of pension or retirement benefits, the value which the party places on these benefits, the method of evaluating these benefits, and the facts and documentation upon which the party relies to support his or her valuation.

f. If there is a claim for counsel fee, the amount of fees to be charged, the basis for the charge, and a detailed explanation of the time expended.

g. If evidence will be offered as to the value of any items of tangible personal property, a description of the item, the value which the party places on each item, the method of evaluating each item, and the evidence, including documentation, to be offered in support of this party's valuation. Only brief general testimony as to the total value of all tangible personal property will be permitted if a party does not offer documentation or expert opinion as to the value of items of tangible personal property.

h. If evidence will be offered as to the payment or assumption of liability of any marital debts, the amount of each debt as of the date of separation, the date on which the debt and its

purpose, the amounts and dates of payments made since the date of separation, and the evidence that will be offered to support the claim.

i. If a party claims as marital property any property which is not listed as marital property on the opposing party's inventory and appraisement statement, a detailed description of each item of alleged marital property and evidence, including documentation, that will be offered to support the claim that it is marital property.

j. The equitable distribution, alimony, and counsel fee award which the party recommends that this court make and the party's reasons in support of the recommendation.

4. No pretrial statement or any modification thereafter, may be filed beyond the date of filing established in this court order without an order of court permitting the late filing. THE FILING OF THESE STATEMENTS IS MANDATORY AND APPROPRIATE SANCTIONS WILL BE ENTERED IF THEY ARE NOT TIMELY FILED.

5. Counsel shall confer prior to the filing of Pre-trial Statements and shall enter into a comprehensive Stipulation of Facts Not in Dispute. Such Stipulation shall be filed with the Prothonotary and a copy shall be delivered to this Court at the time of filing pretrial statement.

6. A party who fails to comply with any requirements of paragraph 3(a) through 3(j) of this order of court may not offer any testimony in support of claims for the matters covered in these paragraphs may not be inconsistent with or go beyond the fair scope of the information set forth in the pretrial statement.

In the absence of compelling circumstances, this case will not be continued to accommodate counsel, the parties, or witnesses and all must be present and prepared to proceed on the date and time scheduled.

7. A pretrial conference on the above matters shall be held before the undersigned on the 24th day of January 2001, at 11:30 a.m. in Room 5032.
8. In addition to the above information contained in the pretrial statement each party shall file a brief concerning any disputed issues of law. Such brief shall be filed ten days prior to the trial and any reply brief shall be filed one day prior to the trial.

BY THE COURT:
/s/ Kim D. Eaton, Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff, No. **FD 97-9496**

v. **PACSES No. 940002798**

JOSEPH J. BOSICK, Defendant.

ORDER OF COURT ***[Bifurcation]***

AND NOW, this 26th day of December, 2000, it is hereby ORDERED, ADJUDGED and DECREED that a decree in divorce may be entered prior to the resolution of all pending economic claims in the within matter subject to the following terms and conditions:

1. The entry of a decree in divorce shall not affect Plaintiff's ability to pursue her claims for alimony *pendente lite*, counsel fees, and costs;

2. All economic issues shall survive the divorce decree

3. Defendant shall continue to maintain the existing, or comparable, medical insurance coverage for Plaintiff at his expenses; however, said obligation will terminate at such time as Plaintiff obtains employment where medical insurance coverage is provided for her at no cost to her. In the event that Plaintiff obtains employment and Plaintiff can obtain medical insurance at a cost to her, Defendant then has the option of continuing to cover her, or have her obtain the medical insurance coverage through her employer at Defendant's expense.

4. Plaintiff shall continue to have an insurable interest so that she may maintain ownership of insurance policies, insuring Defendant's life, during the pendency of the proceedings.

5. Defendant shall maintain *pendente lite* or until further Order of Court Plaintiff as the beneficiary of all policies insuring his life on which he has control of beneficiary designation, including but not limited to life insurance available through his employment, and he shall provide counsel for Plaintiff, if requested, proof of insurance and beneficiary designation.

6. All marital property of the parties shall be held in *custodia legis* after entry of a divorce decree, including any and all rights, which Plaintiff may have under ERISA or the Retirement Equity Act of 1984. Defendant shall take whatever steps are necessary to preserve Plaintiff's rights to any retirement interest, such as pension, profit sharing plans, individual retirement accounts, or other similar assets which exist, including maintaining her as a surviving spouse entitled to death benefits upon Defendant's death, even though the parties are divorced. Defendant is further enjoined from making any election to obtain any retirement benefit, whether by electing to retire, loan or otherwise under the Pietragallo, Bosick & Gordon Salary Reduction Profit Sharing Plan or any predecessor or successor plan in which he might have an interest, except as allowed by subsequent order of this Court expressly modifying the provisions of this order and referencing any Domestic Relations Order entered herein respecting any plan or account in which he has any interest. A copy of this order shall be served upon the Plan Administrator of the PB&G Plan. Defendant shall file an interim qualified domestic relations order to preserve Plaintiff's right pursuant to this paragraph.

7. Each party hereby waives, on behalf of his or her estate, the provisions of the witness incompetency provisions of the Pennsylvania Dead Man's Act in the event of his or her intervening death.

8. In the event that Defendant decides to remarry, he shall, prior thereto, obtain a premarital agreement to be effective until equitable distribution or other Order of Court with his intended subsequent spouse: (a) waiving any

interest that she may have as a result of her marriage to Defendant in or to any retirement benefit subject to the provisions of ERISA that she may have; (b) expressly providing that she shall, after her marriage to Defendant, execute all documents necessary to waive any spouse's interest that she may have as a result of her marriage to Defendant in or to any retirement benefit that she may have subject to the provisions of ERISA; and (c) expressly providing that the terms of such premarital agreement are specifically enforceable in equity by Plaintiff.

9. Defendant has represented to Plaintiff that entry of a *bifurcated* divorce will cause her no financial detriment by rendering an otherwise uncollectible debt or judgment collectible by virtue of the entry of a divorce decree. Despite Defendant's representation that no such debt exists and Defendant's representation that he has no present knowledge of any such debt, he is ordered to indemnify and hold Plaintiff harmless in the event that any such debt or judgment is subsequently determined to exist.

10. Plaintiff has represented to Defendant that entry of a *bifurcated* divorce will cause him no financial detriment by rendering an otherwise uncollectible debt or judgment collectible by virtue of the entry of a divorce decree. Despite Plaintiff's representation that no such debt exists and Plaintiff's representation that she has no present knowledge of any such debt, she is ordered to indemnify and hold Defendant harmless in the event that any such debt or judgment is subsequently determined to exist.

BY THE COURT:
/s/ Kim D. Eaton, Judge

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant.

No. **FD 97-9496**

PACSES No. 940002798

DECREE IN DIVORCE

December 29, 2000, the court having reviewed this case, finds that the marriage is irretrievably broken.

Any existing spousal support order shall hereafter be deemed an order for Alimony *Pendente Lite* if any economic claims remain pending and it is decreed that the plaintiff, Mary Ellen Bosick, is divorced and separated from the bonds of matrimony contracted between herself and the defendant. The court hereby retains jurisdiction of any claims raised by this action for which a final order has not yet been entered.

By the Court:
/s/Mulligan, J.

Docket entries:

February 20, 2001, Decree issued ***Nunc pro tunc****, subject to procedural administrative review.* Eaton, J.

February 27, 2001, Decree vacated per Order of Court dated February 16, 2001 Order of Court dated 02/26/01. Divorce decree granted. Eaton, J.

March 2, 2001 Divorce Decree granted Order of Court dated 12/29/00. Mulligan, J.

COUNSEL STIPULATION, which
2001 TRIAL COURT ACCEPTED AS EVIDENCE

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff, No. **FD 97-9496**

v.

JOSEPH J. BOSICK, Defendant.

AND NOW, this 4th day of April,2001, it is hereby stipulated between counsel for Plaintiff and counsel for Defendant that the value of the following Pension Plans and IRAs are as follows:

1. The marital component of Defendant's interest in the PB&G Salary Reduction Profit Sharing Plan as of December 31, 2000 is $1,036,277.00.
2. The non-marital component of Defendant's interest in the PB&G Salary Reduction Profit Sharing Plan as of December 31, 2000 is $87,717.00
3. Defendant's interest in Ferris, Baker Watts, Inc. IRA Account No. 1488546 (formerly Paine Webber IRA) as of December 31, 2000 is $260,903.00. There were no post-separation contributions to this IRA and the entire account value is marital.
4. Defendant's interest in Morgan Stanley Dean Witter IRA Account No. 617-000000-054 as of December 31, 2000 is $3,497.00. There were no post-separation contributions to this IRA and the entire account value is marital.
5. Plaintiff's interest in Morgan Stanley Dean Witter IRA Account No. 617-000000-054 as of December 31, 2000 is $29,562.00. There were no post-separation contributions to this IRA and the entire account value is marital.

Respectfully Submitted,

WILDER & MAHOOD, P.C.

/s/ Joanne Ross Wilder, Esq.
436 Seventh Avenue
10th Floor, Koppers Building
Pittsburgh, PA 15219
Attorney for Plaintiff

GILLOTTI, CAPRISTO, & BECK, P.C.

/s/ Chris F. Gillotti, Esq.
310 Grant Street
215 Grant Building
Pittsburgh, PA 15219
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant.

No. **FD 97-9496**

PACSES No. 940002798

Qualified Domestic Relations Order

Date: February 25, 2003.

This Order applies to the Pietragallo, Bosick & Gordon Amended and restated Salary Reduction Profit Sharing Plan (the Plan) and such other vested retirement plans in which the Participant has or had a beneficial interest. Alternate Payee is the former wife of Participant. This Order assigns to the Alternate Payee the sum of $366,130 of the participant's **vested** account balance under the Plan said sums shall not be subject to any increase and/or decrease as a result of market performance and/or actual interest and dividends earned thereof from the date of this Order to the date that the portion[2] of the plan specified herein is distributed from Participant's retirement benefits to the Alternate payee in a single lump-sum cash payment as soon as administratively feasible following the qualification of this order. See order as specified.

BY ORDER OF COURT:
/s/Eaton, J.

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1. *Plan* assets "frozen" by this order remain in Bosick's control.

Pennsylvania Divorce Action
Filed: July 2, 1997
FD 97-009496-06

401k Exclusions from Child Support Orders

March 18, 1998
APL/child support
Hearing Officer Recommendations

December 30, 1998
APL/child support
Order by Judge Max Baer

December 30, 1998
APL/child support
Opinion by Judge Max Baer

January 4, 1999
APL/child support
Arrears Order by Judge Max Baer

August 4, 2000
401k Exclusions from APL/Child Support
Appeal denied by Order and Opinion of
The Pennsylvania Superior Court of Pennsylvania

April 2, 2001
401k Exclusions from APL/Child Support
Petition for *Allocatur* denied by Order of
The Supreme Court of Pennsylvania

November 2004
APL/child support
$100,519 overpayment made1998-2002 by Bosick
"Due to April 10, 2002 modification," retroactive to1998.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA— FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

No. FD 97-9496

APL/child support
March 18, 1998

EXPLANATION

A. Husband's Income

The Master finds that, while once made the decision may be irreversible for a year, the decision to contribute to husband's Keogh plan is his decision only (rather than one mandated by his law firm) and thus it is voluntary and should be added back to determine husband's post-separation income. However, so long as the parties are not separated (which they are not at present), his contributions, whether voluntary or not, will be included in marital property and will be distributed to the parties.

Post-separation, with the Keogh contribution not deducted, husband's net monthly income is $18,074 as follows:

$371,901	Total Gross Income
-102,806	Federal tax, married filing separately*
- 10,413	State tax
- 3,691	Local tax
- 17,910	Social Security
- 14,879	Necessary business expenses
- 5,204	Medical insurance
$216,892	Annual net
$ 18,074	Monthly net

Tax calculation*

Total taxable income (Exhibit F)	$290,167
Federal tax, married filing separately	$102,806

His pre-separation net income (from which the Master would

deduct the Keogh contribution for the reasons stated earlier) would be increased by $2,458 per month (representing 1/12 of $29,500) making the monthly total $20,532. However, it matters little in the pre-separation situation, since wife's unmet reasonable needs are so small in that instance.

B. The Wife's Earning Capacity

Given that the wife has completed a significant portion (approximately 1/3) of her total law school education, if wife were, in fact, still attending law school, the Master would find it reasonable to give her no earning capacity, but that is not the case. Wife is not in school nor has she been accepted at any law school. Given wife's education (a BA in elementary education and a Master's degree obtained in 1975, as well as four semesters of law school) and her impressive skills demonstrated in a dazzling array of high powered volunteer activities, particularly in the area of fund raising, she simply cannot be considered to have no earning capacity while she neither works nor goes to school. She testified that she has not sought employment because she is a full time mother, but that simply is not persuasive, given the fact that the parties' minor children are 17 and 13.

Wife testified that husband's vocational expert gave an accurate description of wife's skills in her report (Exhibit C). Wife's resume (Exhibit A) also sets forth a good description of wife's skills. Wife did describe another woman of her acquaintance with fund raising skills which were similar to but no better than wife's. Wife testified that the woman was able to obtain paid employment at a $50,000 annual salary. However, unlike wife, that woman was a stockbroker. Husband's expert also put wife's earning capacity at $50,000 per year, but did not offer any specific employment opportunities in the Pittsburgh area that might match wife's skills. Further, it took the stockbroker, with fundraising skills like wife's, two years to land a $50,000 per year job. That being so, the Master believes that, with luck and time, wife could land such a position at a $50,000 annual salary. However, the luck and time needed require a

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA— FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

No. FD 97-9496

APL/child support
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Wife, through her counsel, testified that she has paid legal fees of $10,165 (of which $523 is costs) and has a still-outstanding counsel fee obligation of $8,538, making her total legal expenses to date $18,703. No counsel fee exhibit was entered, so it is not possible to tell what is done or what remains to be done. The pleadings which have been filed provide little guidance. The first pleading is wife's divorce complaint filed on July 2, 1997. She has also filed her Inventory and Appraisement setting forth the marital property and she has been required to respond to husband's Interrogatories and Request for Production of Documents. There is an order, dated November 18, 1997, permitting the Master to award preliminary counsel fees in excess of $1,000. Wife's budget asserts ongoing counsel fee costs of $1,500 per month. Because the Master does not find sufficient evidence to support prospective fees in that amount (given the amount of work that has obviously been done judging by the fees incurred) the Master adjusts wife's counsel fee need down to $1,000 per month.

In summary, considering the adjustments discussed above, wife's pretax reasonable needs following separation, if she has custody of two minor children, are $14,940 per month as follows:

$18,901	Wife's asserted pretax reasonable needs for herself and two children
- 1,115	Condominium expense to be paid by husband
- 400	Daughter's high school tuition to be paid by husband
- 210	Reduction in children's alleged counseling expenses
- 360	Reduction in food expenses
- 90	Child care expenses
- 500	Counsel fee adjustment
- 1,286	Insurance expense
$14,940	Adjusted pretax reasonable needs for wife and two children

Wife's net earning capacity of $2,320 per month

makes her unmet pretax reasonable needs $12,620 per month. To gross that figure up to sufficiently adjust for wife's income taxes, would require an award to wife which, given the direct payments husband would be making to preserve marital assets, would exceed his total income, although without knowing who would remain in the marital residence after separation, it is not possible to know which party would be entitled to those substantial tax deductions.

This case illustrates the adage that, while husband might have been able to meet the expenses of wife and two minor children when they all resided under one roof, he cannot do it in separate housing. If they separate, the standard of living of both parties and their children will necessarily be diminished.

Adding wife's net earning capacity to husband's net income produces a total of $20,394 per month in possible net family income. The Master is recommending that, if the parties separate and wife has custody of two minor children, husband pay unallocated alimony *pendente lite* and child support of $12,500 per month. In that way, three of the four people will have 73% of the possible income. That fairly allocates what will be necessary belt tightening for everyone.

So long as they are not separated, the Master recommends that wife continue to receive $1,200 per month in rental income plus $500 per month from husband, with husband to pay all household expenses and all of wife's car expenses (which wife has been paying with her allowance). The only expenses wife will be paying from her allowance, rental income, and earning capacity prior to separation will be her counsel fees and her clothing.

March 18, 1998
/s/ Patricia G. Miller, Master

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, Plaintiff
No. FD 97-9496-1

v.

JOSEPH J. BOSICK, Defendant

FINAL ORDER OF COURT - **APL/child support**

AND NOW, this 30th day of December 1998, after full consideration of Defendant Joseph J. Bosick's, (Father) exceptions, and Plaintiff Mary Ellen Bosick's (Mother) cross-exceptions to the Report and Recommendation of this Court's Hearing Officer, who considered the issues of child support, alimony *pendente lite* (APL) and counsel fees, and in conformity with the Opinion entered on even date herewith in support hereof, it is hereby ORDERED as follows:

1) Mother and Father have three children. Michael, their oldest, is 20 years old and is not pertinent to this case. Brian, the middle child, was born April 6, 1980; was 18 years of age in April, 1998; and graduated from Central Catholic High School at approximately the end of May, 1998. The parties' youngest child, Jennifer, is 14 and lives with mother.

2) Mother filed a *praecipe* to seek child support, APL and counsel fees on July 7, 1997. Our hearing officer entered her recommendation on March 18, 1998. It is stipulated between the parties that after approximately April 1, 1998, they have lived separate and apart. Brian graduated from high school (and was already 18) on or about May 31, 1998. We will decide this case on these premises.

3) From July 8, 1997 through March 31, 1998, Father shall have paid all of Mother's expenses plus given her $500

in direct payments in accordance with the practice that has been followed by the parties during this time frame.

4) We will enter a combined child support, APL order for Mother and two children (Brian and Jennifer) from April 1, 1998 through May 31, 1998 (approximately Brian's high school graduation date), and a combined child support and APL order for Mother and one child (Jennifer) after May 31, 1998.

5) As explained in our opinion, Father's income available for the payment of child support and APL in accordance with applicable law is $16,400 per month, and Mother's income available to support herself and the parties' child(ren) living with her is $700 per month. Accordingly, the parties' combined monthly income is $17,100 of which Father has approximately 96% and Mother has approximately 4%.

6) Also, in accordance with out opinion, we find the reasonable needs for Mother and child(ren) are $10,970.

7) Mother is entitled to APL and child support in the approximate amount of 96% of $10,970 which equals $10,470. We round this amount to $10,400 which shall be our award of APL and child support to Mother and two children effective April 1, 1998.

8) Notwithstanding that Brian did not graduate from high school until May 31, 1998, we removed from Mother's budget those expenses attributed exclusively to him. Accordingly, the same order for $10,400 per month shall remain in effect as support for mother and one child, Jennifer, beginning May 31, 1998.

9) Mother filed for child support, APL and counsel fees on approximately July 8, 1997, and seeks retroactivity to that

date. It is undisputed that the parties lived under the same roof until April 1, 1998, and Father paid virtually all of the reasonable and necessary expenses for Mother and children during that period, as well as providing Mother with an additional $500. Accordingly, Mother's request for a retroactive award of APL and child support from July 8, 1997 through April 1, 1998 is DENIED.

10) Mother's request for lump sum payment of preliminary counsel fees is DENIED.

11) This Court's administrative staff shall enter a form order consistent herewith to allow for our decision herein to be placed on PACSES, and to recompute arrearages.

12) THIS IS A FINAL ORDER. THE PROTHONOTARY SHALL SEND RULE 236 NOTICE TO THE PARTIES.

BY THE COURT,
/s/ Max Baer, Judge.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARY ELLEN BOSICK, Plaintiff,
v.
JOSEPH J. BOSICK, Defendant

FD 97-009496-001

FINAL ORDER OF COURT
Baer, A.J. Dec. 30, 1998
OPINION
Baer, A.J. Dec. 31, 1998

Plaintiff, Mary Ellen Bosick ("Mother") and Defendant Joseph J. Bosick ("Father") were married on April 6, 1974. They are parents of three children, Michael, age 20; Brian, who turned 18 on April 26, 1998, and Jennifer, age 13. Michael is in college at the University of Dayton. Brian graduated from high school at approximately the end of May 1998, and is now also attending the University of Dayton. Jennifer continues to live with Mother, and is attending Oakland Catholic High School in Pittsburgh.

Mother filed for divorce on July 2, 1997, although the parties continued to live in the marital residence together. Her divorce complaint contained counts for alimony pendente lite (APL), child support, counsel fees and costs, and on July 8, 1997, she filed a praecipe seeking a hearing regarding these claims. The case was declared complex, and was eventually heard by one of this Court's permanent hearing officers beginning February 20, 1998 and concluding March 3, 1998. On March 18, 1998, the Hearing Officer entered a Report and Recommendation. Father filed exceptions and mother filed cross-exceptions. This opinion is entered together with a final order of even date to decide those exceptions.

1. Father's Income

Father is a partner in a large Pittsburgh law firm. The hearing officer found that his monthly net income for purposes of establishment of child support and APL was $18,074. Father took an exception arguing that the $29,500 he contributed to his firm's profit sharing plan was non-voluntary and, therefore, should not have been included as part of his income. We agree as to $20,000 of this amount.

The facts are that two years before the parties separated, Father's law firm's management committee voted to require that mandatory contributions be made to the firm's retirement fund. In accordance with this dictate, Father was required to contribute $20,000. While Father had one of the votes establishing this mandatory contribution, he, by no means, controlled this decision. Moreover, the decision was made while the parties were married and living together. Accordingly, Father's contribution of $20,000 was a non-voluntary contribution to a retirement plan, and should have been deducted from Father's gross income for support purposes. See Pa. R.C.P. No. 1910.16-5(b)(2). The other $9,500 contribution by Father was voluntary, and therefore was properly included in Father's income.

Father also excepts arguing that we should subtract from his net income the $510 per month he has been paying as expenses on the parties' Aspinwall property. As we are no longer imposing the obligation to pay this money upon Father, this exception is moot.

Mother took an exception to Father's income arguing that the hearing officer erred by having Father file using a "married filing separately" tax status rather than a "single" tax status. We deny this exception. There is nothing in the record indicating that the parties will be single during calendar year 1998, or, indeed, in the foreseeable future. Thus, it was reasonable for the hearing officer to use the married filing separately status. Accordingly, we take $20,000 of the amount Father contributed to his firm's pension plan and divide it by 12 to arrive at a monthly figure

of $1,667. We subtract that amount from the $18,074 net income found by the hearing officer, to reach a net income for Father of $16, 407, which we will round to $16,400.

2. Mother's Earning Capacity and Income

Mother had been attending Duquesne Law School, but was asked not to return because she fell short of the minimum grade requirement by the slimmest of margins. She then applied for entrance into the University of Pittsburgh Law School, but, at the time of the hearing, had not yet been accepted or rejected. The hearing officer, on the basis of the fact that Mother was not in law school and had been involved in many significant volunteer activities, assigned an earning capacity of $35,000 per year.

We decline to accept this recommendation. First, the record fairly read makes it unclear whether Mother will or will not be accepted into law school at the University of Pittsburgh. We believe no earning capacity should be assigned pending that decision, and a reasonable time period thereafter. This will allow Mother the opportunity to plan her future intelligently and proactively. If she, in fact, is accepted, she will not have to choose between quitting a new position or completing law school. If she is not accepted, she will have a fair opportunity to seek appropriate employment in an orderly and appropriate manner. We note that notwithstanding Mother's volunteer activities, she has not held a paying job in decades. Accordingly, as of the date and time of this hearing, Mother should have been given an earning capacity of zero.

Father argued that Mother received $1,200 per month from the parties' Aspinwall property, and this should have been included. We agree, but note that in accordance with Father's testimony, there is approximately $500 per month in expenses incident to this property. Accordingly, Mother's monthly net income is $1,200 less $500 or $700.

3. Reasonable Needs of Mother and Children

Mother filed exceptions arguing that she was not awarded sufficient income to meet her and Children's

reasonable needs. Father excepted that the hearing officer's recommendation was punitive and confiscatory. Our hearing officer correctly noted that this case illustrates the adage that a wage earner might be able to meet the expenses of his or her family when they are residing together, but cannot do so when they are separated.

Father takes home $16,400 a month, and Mother takes home $700 a month. This is a total income of $17,100. Nevertheless, Father states his reasonable needs to be $31,000, and Mother states her and Children's reasonable needs to be $19,000. Thus, if one believes the budgets submitted, neither of these parties can live alone on the total net income they bring home together. The reality, however, is that they must. Thus, we will divide the $17,100 between them so that each party and Children can be reasonably maintained. It would have been much easier for us to do this if parties had not submitted whimsical budgets, but we will, nevertheless, undertake the task.

The parties' collective income exceeds our statewide support guidelines. Accordingly, we have conducted an analysis which is analogous to that required by Melzer v. Witzberer, ___ Pa. ___ , 480 A.2d. 991 (1984). We did this by taking the total amount available to meet the reasonable needs of Father, Mother, and Children, and cutting Mother's budget to a level that leaves sufficient monies to meet Father's reasonable needs, while, at the same time, meeting Mother's and Children's reasonable needs. In the case of both parties, reasonability requires that these needs be adjusted in light of the available income.

As we stated above, Mother asserted that the reasonable needs for herself and the parties' Children were $18,900. We have cut her expenses in many categories, and will explain briefly our justification for doing so. We cut Mother's food budget from $1,200 to $840. Mother testified that she could supply food for everyone, including father, for $1,200 per month. Father's estimate for food for everyone but Mother was $840. Accordingly we accepted the $840

figure, as did the hearing officer, as the reasonable amount for Mother and Children. We reduced Mother's clothing allowance from $1,800 per month to $200 per month. We note that Father only requires $200 a month to clothe himself, notwithstanding his $31,000 budget. Whether mother is a socialite, a law student or looking for employment, given her current wardrobe (based upon what she has been spending to date), it is inconceivable that she needs more than $200 a month to supplement it between now and the conclusion of the economic issues surrounding the divorce.

We cut Mother's expenses for parking and tolls from $60 a month to $20 a month, and her car expense from $614 a month to $5[illegible]4 a month. We found both of these figures over-inflated.

We eliminated Brian's expenses entirely. He turned 18 on April 26, 1998, and graduated from high school on or about May 31, 1998. We did not desire to further complicate this case by entering one order for the time period from April 1, 1998 through May 31, 1998, and a second from May 31, 1998 forward. We were going to cut Brian's budget by $1,000 in any event, and felt that it served clarity and judicial economy to cut it the entire amount of $1,328. We are sure Mother can find the $328 we would have left for Brian elsewhere in the over $10,000 we are awarding to her.

We subtracted from Mother's budget the entire $1,115 in condominium expenses for Seven Springs. Throughout this litigation, Mother has argued vehemently that she desires to keep Seven Springs. Indeed, she successfully sought to have us award the condominium, the marital residence and the Aspinwall real property to her as an advance on equitable distribution so that she could refinance the other property to keep Seven Springs.

Father has argued consistently that the parties cannot afford Seven Springs and that it should be sold. If we required Father to pay these expenses, Mother would be keeping Seven Springs notwithstanding Father's assertions that the parties cannot afford it, and we would be imposing

upon him the obligation to pay for it. If we included these expenses in the reasonable needs of Mother and children, Father would be paying almost all of the costs because he earns almost all of the income.

If Mother desires to keep Seven Springs, she should adjust her budget to pay for it. If she cannot afford it, she should sell it. However, the expenses incident to this condominium should not be included as reasonable and necessary in Mother's budget. Accordingly, we subtracted the $1,115 from Mother's reasonable needs, and did not impose the obligation to pay this amount upon Father.

We cut Mother's budget for household help from $239 per month to $100 per month. Again, we believe this is necessary given the amount of income available to these parties. Mother conceded she no longer needed child care, so we eliminated from the budget the $90 allocated to that item. Mother allocated $300 per month for beauty shop and makeup. We cut this to $100 a month, and likewise, cut her entertainment budget from $200 to $100 per month. We cut her papers, books, and magazines from $42 a month to $20 a month, and her charitable contributions from $200 a month to $50 a month. All of these cuts follow the same general theme. There is simply not enough money for either parent, or the Children, to live the same affluent lifestyle they one did and, given the parties' income, these are what can reasonably be afforded by Mother and Children.

We cut Mother's vacation fund from $1,000 a month to $250 a month. This still leaves her with $3,000 per year to take a vacation, and that should be sufficient. We cut her legal fees from $1,500 a month to $500 a month. She is always free to apply for additional legal fees at the conclusion of the case, when we trust there will be substantial property to distribute.

Finally, we cut Mother's other expenses from $1,575 a month to $575 a month. These other expenses are very much perquisites of an affluent lifestyle, and included $800 a month for club dues. Mother can simply no longer afford all

of these accouterments. That completes our adjustment of Mother's budget. Her total expenses per month in accordance with our modifications are $10,970.

In accordance with the teachings of Melzer, Father is obligated for approximately 96% of this amount which would be $10,470. We rounded this to $10,400, and award Mother and Children this amount effective April 1, 1998. As explained above, notwithstanding Brian's 18th birthday and graduation from high school, this award will continue pending further order of court.

Also, pursuant to Melzer, it is necessary to conduct a "gut check" of our award to insure that Father has sufficient funds to support himself. Our award provides Mother and Children with about $11,000 to support themselves, and provides Father with about $6,000 to support himself. We believe this permits all involved to meet their reasonable needs to the extent possible given their available income.

3. Retroactivity.

Mother excepted to the hearing officer's failure to award retroactive arrearages, pointing out that the praecipe to set child support and APL for hearing was filed on approximately July 8, 1997. Normally, Mother would be correct. However, in this case, Mother and Father lived under the same roof through April 1, 1998, and Father paid all of the expenses for Mother and Children and provided Mother with an additional $500 a month. Mother was able to accumulate a substantial savings during that period.

We find that Father's direct payments to Mother of $500, and his payment of all of her and Children's reasonable needs, satisfied Father's obligation to support Mother and Children through the date the hearing officer decided this case – March 18, 1998.

From that date through April 1, 1998, the hearing officer directed that Father continue to pay all of Mother's and Children's expenses and to give Mother $500 a month, which had been the practice between the parties. We will assume he did that. If he did not, we will expect that counsel

will work out any differences in an informal manner. Accordingly, we will set our support order effective April 1, 1998, when father moved from the marital residence, and we direct that retroactivity be set in accordance with our final order as of that date.

Father argued that the hearing officer abused her discretion in awarding preliminary counsel fees of $5,000. We agree. The evidence in this record indicates that Mother had the financial resources to meet her counsel fees through either savings or marital property which she took at the time of separation. Additionally, we have advanced to her the marital residence, the Seven Springs condominium, and the Aspinwall real property which, while not liquid, all have equity. On the basis of total record, we do not believe an award of preliminary counsel fees is appropriate. We did permit Mother to maintain an additional $500 per month in her budget for counsel fees as part of her budget. This will have to be sufficient to permit her to meet her counsel fee needs until equitable distribution.

/s/ Baer, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSLVANIA--FAMILY DIVISION

MARY ELLEN BOSICK, No. FD 97-9496
Plaintiff

PACSES No. 940002798

v.

JOSEPH J. BOSICK,
Defendant

ORDER OF COURT

AND NOW, 4th day of January, 1999, based upon the Court's determination that Payee's monthly net income is $700.00 and the Payor's monthly net income is $16,400, it is hereby ordered that the Payor pay to the Domestic Relations Section, Court of Common Pleas, TEN THOUSAND FOUR HUNDRED Dollars ($10,400) a month ($10,400 for current support and **$0.00 on arrears**) payable MONTHLY as follows: ON THE FIRST OF EACH MONTH. The effective date of the order is 04/01/98.

Arrears set at $49,935.00 as of JANUARY 4, 1999 are due in full IMMEDIATELY. Contempt proceedings, credit bureau reporting and tax refund offset certification will not be initiated and judgment will not be entered, as long as payor pays on arrears on each payment date as specified above. Failure to make each payment on time and in full will cause all arrears to become subject to immediate collection by all of the means listed above.

For the Support of: JENNIFER K. BOSICK, BRIAN J. BOSICK, MARY ELLEN BOSICK. Said money to be turned over by the Domestic Relation Section to: MARY ELLEN BOSICK. Payments must be made by CASH, CHECK, MONEY ORDER OR WAGE ATTACH. All checks and money orders must be made payable to: FAMILY DIVISION and mailed to COLLECTIONS AND DISBURSEMENTS at: ALLEGHENY CO. FAMILY DIV, ALLEGHENY BUILDING, 429 FORBES AVENUE, SUITE 201, PITTSBURGH, PA 15219. Each payment must bear your PACSES Member Number in order to be processed. Do not send cash by mail.

[**The next section of this Form Order refers to medical insurance; no determination was made in this case, so this section is omitted**].

IMPORTANT LEGAL NOTICE

PARTIES MUST WITHIN SEVEN DAYS INFORM THE DOMESTIC RELATIONS SECTION AND THE OTHER PARTIES, IN WRITING, OF ANY MATERIAL CHANGE IN CIRCUMSTANCES RELEVANT TO THE LEVEL OF SUPPORT OR THE ADMINISTRATION OF THE SUPPORT ORDER, INCLUDING, BUT NOT LIMITED TO, LOSS OR CHANGE OF INCOME OR EMPLOYMENT AND CHANGE OF PERSONAL ADDRESS OR CHANGE OF ADDRESS OF ANY CHILD RECEIVING SUPPORT. A PARTY WHO WILLFULLY FAILS TO REPORT A MATERIAL CHANGE IN CIRCUMSTANCES MAY BE ADJUDGED IN CONTEMPT OF COURT, AND MAY BE FINED OR IMPRISONED.

PENNSYLVANIA LAW PROVIDES THAT ALL SUPPORT ORDERS SHALL BE REVIEWED AT LEAST ONCE EVERY THREE (3) YEARS IF SUCH REVIEW IS

REQUESTED BY ONE OF THE PARTIES. IF YOU WISH TO REQUEST A REVIEW AND ADJUSTMENT OF YOUR ORDER, YOU MUST DO THE FOLLOWING: CALL YOUR ATTORNEY. AN UNREPRESENTED PERSON WHO WANTS TO MODIFY (ADJUST) SUPPORT ORDER SHOULD CONTACT THE DOMESTIC RELATIONS SECTION.

A MANDATORY INCOME ATTACHMENT WILL ISSUE UNLESS THE DEFENDANT IS NOT IN ARREARS IN PAYMENT IN AN AMOUNT EQUAL TO OR GREATER THAN ONE MONTH'S SUPPORT OBLIGATION AND (1) THE COURT FINDS THAT THERE IS GOOD CAUSE NOT TO REQUIRE IMMEDIATE INCOME WITHHOLDING; OR (2) A WRITTEN AGREEMENT IS REACHED BETWEEN THE PARTIES WHICH PROVIDES FOR AN ALTERNATE ARRANGEMENT.

DELINQUENT ARREARAGE BALANCES MAY BE REPORTED TO CREDIT AGENCIES. ON AND AFTER THE DATE IT IS DUE, EACH UNPAID SUPPORT PAYMENT SHALL CONSTITUTE A JUDGMENT AGAINST YOU.

IT IS FURTHER ORDERED THAT, upon payor's failure to comply with this order, payor may be arrested and brought before the Court for a Contempt hearing; payor's wages, salary, commissions, and/or income may be attached in accordance with law; this Order will be increased without further hearing to $16,640.00 a month until all arrearages are paid in full. Payor is responsible for court costs and fees.

BY THE COURT:
/s/ Max Baer, Judge

IN THE SUPERIOR COURT OF PENNSLVANIA

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759 WDA 1999

MARY ELLEN BOSICK, *Appellant,*
v.
JOSEPH J. BOSICK, *Appellee,*

Appeal from Order Dated April 12, 1999

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811 WDA 1999

MARY ELLEN BOSICK, *Appellee,*
v.
JOSEPH J. BOSICK, *Appellant.*

Appeal from Order Dated April 12, 1999

In the Court of Common Pleas of Allegheny County
Family Division, No. FD 97-009496-001

BEFORE:
FORD ELLIOT, J., CIRILLO, P.J.E., and TAMILIA, J.
*CIRILLO, P.J.E. did not participate in
the consideration or decision of this case.

MEMORANDUM: **Filed Aug. 4, 2000**

Mary Ellen Bosick (Wife) appeals and Joseph J. Bosick (Husband) cross-appeals from an unallocated order of the Court of Common Pleas of Allegheny County requiring Husband to pay $10,400 per month for the support of Wife and one child.

The parties were married on April 6, 1974. Wife is

now 50 year sold and Husband is 52 years old. Three children were born of the marriage, two of whom are emancipated. The youngest child Jennifer, age 15, lives with Wife. Wife filed a divorce complaint on July 2, 1997. In her complaint, Wife sought the equitable distribution of marital property, child support, alimony pendente lite, and counsel fees. Both parties were living in the marital residence at the time of the hearings before Master Patricia Miller on February 20, 1998 and March 3, 1998.

Wife is a teacher by profession. She graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. Wife received a Master of Education degree in Curriculum and Supervision from the University of Pittsburgh in 1975. Wife has not been employed as a teacher since 1977. During the parties' marriage, Wife has been involved in extensive volunteer activities in the area of fundraising. Wife also managed a lawn equipment business for two years beginning in 1988.

At the time of the hearings in this matter, Wife had completed one year of law school at Duquesne Law School, but was dismissed because her grade point average had fallen below the minimum acceptable standards set by the school. She subsequently applied to the University of Pittsburgh Law School. At the time of the hearings before the master, Wife had not yet been accepted for admission to the University of Pittsburgh's Law School.

Husband is a partner in a Pittsburgh law firm. Husband's gross income in 1997 was $371,901. In calculating the support award, the hearing master found Husband's net income to be $18,047 per month and attributed an earning capacity of $2,320 per month to Wife. The master recommended that Wife receive $500 per month plus $1,200 rental income as long as the parties resided together, and that Wife receive $12,500 per month with Husband to directly pay the costs of the marital real estate, life insurance policies, the children's tuition, and health insurance as soon as the parties occupied separate residences.

The $12,500 per month support award was contingent on Wife remaining the primary custodian of the parties' children. Husband was to pay preliminary counsel fees of $5,000. Husband filed exceptions to the recommendation and Wife filed timely cross-exceptions.

By order dated December 31, 1998, the trial court sustained some of the exceptions. The court found Husband's net income to be $16,400, Wife's earning capacity to be zero, and her rental income to be $700. The court ordered Husband to pay $10,400 per month and declined to make the order retroactive. Both parties filed motions for reconsideration. By order dated January 28, 1999, the trial court granted reconsideration of both parties' motions. However, on April 9, 1999, the trial court denied reconsideration and directed that its December 31, 1998 order stand as entered. Wife appealed and Husband cross-appealed. By order dated June 2, 1999, this court consolidated the appeals.

Wife raises the following issues for our consideration:

I. Is husband's contribution to his retirement plan "non-voluntary" so as to reduce his support obligation?

II. Did the trial court err in failing to consider the tax consequences of the support order?

III. Did the trial court apply the correct tax rate to calculate Husband's net income?

IV. Did the trial court err in failing to make the support order retroactive?

V. Did the trial court err in refusing to award preliminary counsel fees?

Wife's Brief at 7.

Husband raises the following issues for our consideration:

I. Whether the trial court exercised manifestly unreasonable judgment when it made an

award of child support and APL to Mother and one child which resulted in Mother's share of the total net monthly income being sixty-five percent and Father's share being thirty-five percent.

II. Whether the trial court erred by violating the rights guaranteed to Father by the Due Process Clause in the United States Constitution and the Commonwealth of Pennsylvania Constitution and also violated the Pennsylvania Divorce Law when it made an advance on equitable distribution to the Mother of three real properties without notice to the parties, without the parties being present, and without taking testimony or otherwise having an evidentiary hearing.

III. Whether the trial court exercised manifestly unreasonable judgment when it gave Mother an earning capacity of zero.

Husband's Brief at 1.

At the outset, we not that our scope of review with respect to assessing the propriety of support awards is a narrow one: the amount of support awarded is largely within the sound discretion of the trial court whose decision will not be disturbed absent a clear abuse of that discretion. Calabrese v. Calabrese, 670 A.2d 1161, 1162 (Pa. Super. 1996). Appellate review of an alimony pendente lite award is similarly gauged by an abuse of discretion standard. Jayne v. Jayne, 663 A2d 169, 176 (Pa. Super. 1995).

Wife first argues that Husband's $20,000 annual 401(k) contribution is neither non-voluntary nor a condition of his employment and, therefore, should not reduce his support obligation. According to the Pennsylvania Support Guidelines, the amount of support to be awarded is based in large part upon the parties' monthly net income. Pa.R.Civ.P. 1910.16-5(b). Monthly net income is determined by subtracting, among other things, non-voluntary retirement

payments. Rule 1910.16-5(b)(2). The trial court determined that the $20,000 annual payment was a non-voluntary contribution. The court reasoned:

> The facts are that two years before the parties separated, Father's law firm's management committee voted to require that mandatory contributions be made to the firm's retirement fund. In accordance with this dictate, Father was required to contribute $20,000. While Father had one of the votes establishing this mandatory contribution, he, by no means, controlled this decision. Moreover, the decision was made while the parties were married and living together. Accordingly, Father's contribution of $20,000 was a non-voluntary contribution to a retirement plan, and should have been deducted from Father's gross income for support purposes. See Pa.R.C.P. No. 1910.16-5(b)(2). The other $9,500 contribution by Father was voluntary, and therefore was properly included in Father's income.

Trial court opinion, 12/31/98 at 2. We find no abuse of discretion here.

Next, Wife argues the trial court erred in failing to consider the tax consequences of the unallocated support order. Wife complains the budget she submitted listing her living expenses did not include the payment of income taxes. Unallocated spousal and child support payments are considered taxable income to the recipient and are deductible to the payor. Holland v. Holland, 663 A.2d 768, 770 (Pa.Super. 1995); Pa.R.Civ.P. 1910.16-5(f). Wife contends that because she will have to pay income tax on the support award, the taxes are a reasonable need of hers and should have been taken into account by the trial court.

Admittedly, the trial court did not mention the tax consequences of the award in his opinion. However, this omission is not fatal. Rule 1910.16-5(f) does not require that the court consider the income tax ramifications of an unallocated support order. While the rule speaks of income tax considerations being an important factor to parties in

higher income brackets, the rule does not require that an award be made only after the consideration of income tax. The rule only states that the trier of fact should utilize the guidelines which result in the greatest benefit to the obligee. Instantly, the trial court awarded 65% of Husband's net salary to Wife and one minor child. We believe Wife's needs have been considered, and if she requires additional money for the payment of income taxes, she will have to adjust her expenses. We will not disturb the trial court's determination.

Next, Wife argues Husband's income was understated because the wrong tax rate was applied. Wife is claiming that Husband's net income should have been increased by approximately $10,000 per year because it was within his power to reduce his taxes by that amount. Wife maintains that since she filed her affidavit of consent to entry of a divorce on December 2, 1997, if Husband had then filed his consent, the parties could have been divorced before the end of 1997. Wife claims Husband would have been able to file his taxes as "single" rather than "married, filing separately," which would have resulted in considerable tax savings to Husband. We reject this argument.

Husband is under no requirement to quickly sign an affidavit of consent so that the parties can divorce. 23 Pa. C.S.A. 3301. Moreover, it is sheer speculation on Wife's part to even think that the trial court would grant a divorce when the parties were still living in the marital residence. Also, the question of whether the parties could have reached an agreement on the conditions of a divorce that would have preceded equitable distribution is highly unlikely.

Next, Wife argues the trial court erred when it failed to make the support order retroactive. Procedurally, Wife filed her divorce complaint in which she sought support in July of 1997. Hearings were held in February and March 1998. The hearing master filed her recommendation on March 18, 1998. A final order was entered on December 31, 1998 in which the trial court denied wife's request to make the support award retroactive to July 1997. Wife argues the

order should be retroactive because once she informed Husband of her intention to divorce, he stopped depositing his paycheck into the joint account from which Wife had paid household bills. Thereafter, Wife claims Husband only paid certain bills. The record belies Wife's claims.

> Husband's counsel: Mrs. Bosick, up to this date you will acknowledge, will you not, that your husband has been paying all of the expenses of the household for yourself and the children?
> Wife: He has been paying since we requested;
> Q: He is paying all of the expenses attributable to the mortgages?
> A: Those are paid.
> Q: Utilities?
> A: Those are paid.
> Q: Food?
> A: That's paid.
> Q: Maintenance of the household?
> A: That's paid.
> Q: Children's tuition?
> A: That's paid.
> Q: Insurance?
> A: That's paid.
> Q: Automobile expenses?
> A: That's paid. There are some auto expenses on my credit card.
> Q: Ms. Wilder testified that [Husband] made a change back in June by not putting money into the account and instead started paying your bills directly?
> A: That's correct.
> Q: But he has been paying all the bills that have come into the household attributable to maintaining the house, hasn't he?
> A: The house, yes.

Q: And he has paid all the expenses attributable to the children; correct?
A: Not all.
Q: What has he not paid?
A: When it came time to buy clothing to start school, shoes, things like that, they are all on the credit card.
Q: They are on your credit cards?
A: Right
Q: Did you submit those to [Husband] for payment?
A: Some of them I did and some of them he paid, but not nearly all of them. And it started a lot of conflict in our home. The biggest blow-up we had was September 9, and that was over a twenty dollar haircut, so we quit asking for money.
Q: When you say 'we,' you mean you quit asking?
A: Well, they had asked him for twenty dollars, and he blew up at me and it scared them.
[Husband's counsel]: I move to strike that. He pays the children an allowance?
A. Yes.
Q: How much is that?
A: Brian gets twenty dollars a week, and Jenny gets ten. There are occasions where he has forgotten to pay them and I have had to fill in.
Q: He pays all the expenses for the Somerset property?
A: Yes.
Q: He pays all the expenses for the Aspinwall property?
A: Yes.
Q: He pays all the insurance for yourself, you and the children?
A: Yes.
Q: And all medical and dental expenses?
A: Correct.
Q: Now, he has been giving you $500 a month?
A: Correct.

Q: And you have been collecting the rent from the Aspinwall property?
A: Correct.
Q: And the Aspinwall property has no cost that you pay—
A: Correct.
Q: --out of the $1,200?
A: Correct.
Q: So you have had $500 a month, plus the $1,200 a month from the Aspinwall property?
A: Correct.

Notes of testimony, 2/20.98 at 14-17. Based on the above, Wife fails to demonstrate that the trial court abused its discretion in failing to make the support award retroactive and we will not disturb its ruling.

Last, Wife argues the trial court erred when it declined to accept the hearing officer's recommendation for payment of preliminary counsel fees of $5,000. The purpose of an award of counsel fees is not to punish one spouse or to reward the other. Nemoto v. Nemoto, 620 A.2d 1216, 1223 (Pa.Super. 1993), citing Hoover v. Hoover, 431 A.2d 337, 338 (Pa.Super. 1981). A showing of actual need must be made in order to justify an award for reasonable attorney's fees and expenses in a divorce action. Id. The award is made on a case-by-case basis. Dech v. Dech, 492 A.2d 41, 44 (Pa.Super. 1985).

Instantly, Wife admitted that she took $23, 000 in marital funds without Husband's knowledge. (Notes of testimony, 2/20/98 at 17-18). She testified that she used a portion of that money to retain counsel. The trial court, in denying Wife's request, found that "[Wife] had the financial resources to meet her counsel fees through either savings or marital property that she took at the time of separation." (Trial court opinion, 12/31/98 at 8). We are unable to say the trial court abused its discretion in denying Wife's claim for counsel fees.

We now turn to Husband's cross-appeal.

1 We begin by addressing Husband's second argument.

Husband argues the trial court violated his due process rights when it made an advance on equitable distribution to Wife of three real properties without notice to him. Apparently, this "advance on equitable distribution" occurred on May 26, 1998 at a conciliation conference. (Husband's Brief at 14).

In her reply brief, Wife argues that the May 26, 1998 interim order is not before this court and is not reviewable until final disposition of the case. Keefer v. Keefer, 741 A.2d 808 (Pa.Super. 1999). We agree. This issue is not properly before us; therefore, we are without authority to address it.

Husband also argues the trial court erred when it gave Wife an earning capacity of zero despite her education, training and experience. "An award of support must be fair, non-confiscatory, and attendant to the circumstances of the parties." Strawn v. Strawn, 664 A.2d 129, 132 (Pa.Super. 1995). The court must consider the parties' earning capacities in a support action. 23 Pa. C.S.A. § 4322(a). Regarding determinations of earning capacity, we do not define a party's earning capacity as an amount that the party could theoretically earn. Adams v. Adams, 563 A.2d 913, 916 (Pa.Super. 1989). Rather, we consider the amount that the person could realistically earn under the circumstances. Id. Factors to be considered include but are not limited to age, health, mental and physical condition, training, and amount of time during the marriage the party has been out of work. Goodman v. Goodman, 544 A.2d 1033, 1035-1036 (Pa.Super. 1988).

Here, the master assigned an earning capacity of

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3 We note that Wife filed a motion to quash Husband's cross-appeal. The motion was granted on August 31, 1999. Husband filed a motion for reconsideration and a motion to correct order. On September 23, 1999, this court rescinded the August 31, 1999 order and reinstated Husband's appeal.

$35,000 per year to Wife. The master discussed her reasoning as follows:

> Given that the wife has completed a significant portion (approximately 1/3) of her total law school education, if wife were, in fact, still attending law school, the Master would find it reasonable to give her no earning capacity, but that is not the case. Wife is not in school nor has she been accepted at any law school. Given wife's education (a BA in elementary education and a Master's degree obtained in 1975, as well as four semesters of law school) and her impressive skills demonstrated in a dazzling array of high-powered volunteer activities, particularly in the area of fund raising, she simply cannot be considered to have no earning capacity while she neither works nor goes to school. She testified that she has not sought employment because she is a full time mother, but that simply is not persuasive, given the fact that the parties' minor children are 17 and 13.

Master's recommendation, 3/18/98 at 2.

The trial court rejected the master's recommendation.

> We decline to accept this recommendation. First, the record fairly read makes it unclear whether Mother will or will not be accepted into law school at the University of Pittsburgh. We believe no earning capacity should be assigned pending that decision, and a reasonable time period thereafter. This will allow Mother the opportunity to plan her future intelligently and proactively. If she, in fact, is accepted, she will not have to choose between quitting a new position or completing law school. If she is not accepted, she will have a fair opportunity to seek appropriate employment in an orderly and appropriate manner. We note that notwithstanding Mother's volunteer activities, she has not held a paying job in decades. Accordingly, as of the date and time of this hearing, Mother should have been given an

earning capacity of zero.

Trial court opinion, 12/31/98 at 3.

We believe the trial court erred when it failed to assign an earning capacity to Wife. While at the hearings in February and March of 1998, Wife was not in law school. If, in fact, Wife had been accepted into the University of Pittsburgh's Law School, that would not have occurred until September 1998.

1 Therefore, from September 1997 through August 1998, Wife was not in school.5 During the course of the hearing, Wife was asked: "Is there any reason why you have not sought employment?" (Notes of testimony, 2/20/98 at 24). She answered: "I consider myself a full time mother. I always have." (Id.)

In White v. White, 313 A.2d 776, 780 (Pa.Super. 1973), wife, who had not been employed during the marriage, sought support from husband. Wife argued she had an absolute right of support from husband. This court held that while wife may have a right of support from husband, that it not to say that she may sit back and refuse to obtain gainful employment, and expect full support to derive from the husband. Id. Moreover, the court stated, "Where a wife's dependency on her husband is voluntary, and not prompted by some justifiable reason such as poor health, a court should take her employability into consideration when fixing the order of support." Id. (Footnote omitted).

While there were no children involved in the White case, we are aware that instantly the parties have a daughter who was 13 years old at the time of the hearings in 1998.

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4 Husband's brief indicates Wife was accepted into the University of Pittsburgh Law School.(Husband's brief at 3).
5 During the summer of 1997, Wife took a course at the Duquesne Law School. (Notes of testimony, 2/20/98 at 7). In doing so, Wife thought it might help her gain re-admittance to the law school. (Id. at 7-8).

Wife was specifically questioned about her availability to work while the child attends school. Wife testified the child leaves at 7:00 a.m. and returns at 4:10 p.m. (Notes of testimony, 2/20/98 at 26). Wife was then asked how working during the day would interfere with her daughter's routine. Id. Wife responded that her daughter had some problems at the beginning of the school year and because she attends a private school she is off quite a few days due to holidays, a break in March, as well as summer vacation. (Id. at 26-27). We are not persuaded that Wife cannot work because she has to take care of her teenage daughter who is in school all day for nine months out of the year, and has occasional school holidays and a summer vacation.

In Commonwealth ex rel. Simpson v. Simpson, 430 A.2d 323 (Pa.Super. 1981), appellant/wife complained the trial court abused its discretion when it assigned an earning capacity to her. Additionally, Wife argued that appellee/husband produced no evidence regarding the availability of jobs or salaries for such jobs. Wife had no serious illnesses and possessed a college degree. There were no minor children involved. In affirming the trial court's attributing wife with an earning capacity of $400 per month, our court looked to the White case:

> In determining whether a wife is employable, the court should take into consideration the amount of time that a wife during her marriage has been out of work. If a wife has been a housewife during all or most of a marriage, relegating the 'bread-winning' role to the husband, that is a relevant factor. Certainly, a woman who has been off of the 'job market' for a considerable period of time may have a more difficult time in obtaining employment than a woman who possibly terminated her employment shortly before the support proceedings or after the separation. Employability, after all, means more than just the availability of work, the relative skills of the worker, the health and stamina of the worker, and the absence of children in the home for which the wife would have responsibility. A court should consider

ali[illegible] above factors and measure those elements with the duration of the unemployment experienced by the wife. Simpson, *supra* 430 A.2d at 326, *quoting* White, supra 313 A.2d at 780 n.5.

In Strawn v. Strawn, supra, wife had not worked during her 16-year marriage. On that basis, the master concluded that no earning capacity would be assessed against her. Wife's age, health, mental and physical condition, or any training she might have received were not considered. We determined the evidence was not sufficient to support the conclusion that wife had no earning capacity in the absence of the court's consideration of all of the factors relevant to that determination.

Instantly, except for a two-year stint in the lawn equipment business, Wife has not been employed since 1979. However, we cannot say that Wife, because she has not held a paying job, is so far removed from the workforce that it is not feasible that she could readily gain paid employment. Wife's own testimony presents a picture of a successful woman who sought a position on a school board, ran her own campaign, and won. She also was involved in various fundraising activities and because of her own success was sought after by other organizations. It seems clear to us that Wife did not need to complete law school to have an earning capacity. Based on Wife's education and varied experience, she already had one.

We reiterate that at the time of the hearings in February and March 1998, Wife was not in law school. Husband's brief informs us that Wife was accepted at the University of Pittsburgh's Law School and is expected to graduate in 2000. See Husband's brief at 3. Obviously, this is not a matter of record before this court. On remand, having already stated that it was error not to have assigned Wife an earning capacity at the time of the hearings, we leave it to the trial court's discretion to determine the appropriate calculation.

Because we are remanding this matter for the assignment of an earning capacity to Wife, we do not need to address Husband's claim that the court erred in attributing 65% of his income for support. That percentage should be lower after consideration of Wife's earning capacity.

For the reasons stated above, we reverse in part the order of the trial court and remand for proceedings consistent with this Memorandum. Jurisdiction relinquished.

/s/ Eleanor R. Valecko, Deputy Prothonotary

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 666 & 667 WAL 2000

MARY ELLEN BOSICK *Pro se*,
Petitioner,

v.

JOSEPH J. BOSICK,
Respondent

Petition for Allowance of Appeal from
Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 2nd day of April, 2001, the Petition for Allowance of Appeal is denied.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

FD 97-009496-006

ORDER
Eaton, J. April 9, 2002

AND NOW, this 9th day of April 2002, it is hereby ORDERED that Defendant's Application to seal the Record is granted. It is further ORDERED that no one other than the parties, their attorneys, or Court personnel are authorized to gain access to the legal papers filed in the above-captioned case.

BY THE COURT:
Kim Eaton /s/ J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

FAMILY DIVISION

MARY ELLEN BOSICK,
Plaintiff,
v.
JOSEPH J. BOSICK,
Defendant.

FD 97-009496-006

OPINION AND ORDER
Eaton, J. April 10, 2002
FINDINGS OF FACT

I. General

1. The Plantiff, Mary Ellen Bosick (Wife), and the Defendant, Joseph J. Bosick (Husband), were married on April 6, 1974. Wife is 52 years old, and Husband is 55 years of age, at the time of this Order.

2. Wife filed a Complaint for Divorce on July 2, 1997. A Decree in Divorce was issued on December 29, 2000.

3. The date of separation is April 1, 1998, the date that Husband left the marital residence. This was a stipulation of the parties.

4. Three children were born of the marriage; two have reached the age of majority; and Jennifer is a senior at Oakland Catholic High School.

5. Husband is a partner in the law firm of Pietragallo, Bosick & Gordon (PB&G). He currently has a 6.3% interest in the partnership. PB&G currently has 19 equity partners. On December 31, 1998, Father had an 8.2% interest in the partnership.

6. Wife graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. She

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6. Wife graduated from the University of Dayton with a Bachelor of Science degree in Education in 1971. She

received a Master of Education degree in Curriculum and Supervision from the University of Pittsburgh in 1975. Mother graduated from the University of Pittsburgh School of Law in June of 2000, and is licensed to practice law in Pennsylvania. Wife acquired employment as an attorney on September 10, 2001. At that time, the parties stipulated that Wife was working 30 hours per week at $10 per hour.

7. Wife was employed as a teacher in the Fox Chapel School District from 1972 until 1977. She was on the Fox Chapel School Board from 1983 to 1987. She has been involved in extensive volunteer activities, and managed a lawn equipment business for two years beginning in 1988.

8. At the time of trial, Wife resided with daughter, Jennifer, in the marital home located in Fox Chapel, Pennsylvania. Jennifer is 17 years old.

9. Husband lives in a rental property in the City of Pittsburgh.

10. On May 21, 1998 at a Conciliation Conference, Judge Max Baer made an advance on equitable distribution to Mother of the following real properties:

(1) Fox Chapel marital residence;
(2) Aspinwall duplex; and
(3) Shaler house.

Husband objected to the advance.

11. Judge Baer also granted Wife's request that the Court award her the marital portion of party's Seven Springs condominium, which had been owned jointly with Husband an another couple. Wife purchased the Seven Springs condominium on December 9, 1998, using funds obtained from voluntarily refinancing the Fox Chapel marital residence on November 24, 1998. Wife used a portion of the proceeds from the refinancing of the marital home to pay off the mortgage on Seven Springs and to buy out the other couple's equity interest in the property.

12. Wife has full title to the Seven Springs Condominium.

13. The November 24, 1998 refinancing by Wife resulted

in a $375,000 mortgage on the Fox Chapel marital residence.

14. The parties stipulated that on April 1, 1998, the mortgage on the Fox Chapel marital residence was in the amount of $160,403, with an additional $14,149 line of credit obligation, leaving a net equity of $240,448.

15. In December 2000, Wife borrowed $120,000 which resulted in a new mortgage on the Seven Springs condominium.

16. After filing for divorce, without giving notice to Husband, Wife borrowed $50,000 from Fidelity Bank on March 4, 1998, which resulted in a $50,000 mortgage on the Aspinwall duplex. Prior to the aforesaid loan, there were no liens on the Aspinwall duplex.

17. On December 3, 1998, Wife borrowed $112,000, which resulted in a new and larger mortgage on the Aspinwall duplex, with a pay-off on the March 4, 1998 $50,000 mortgage.

18. The $375,000 refinancing of the Fox Chapel marital residence, the $112,000 loan with the Aspinwall duplex as collateral, and the $120,000 loan with Seven Springs as collateral are not marital debts.

19. Wife now owns solely in her own name 4 pieces of real property—the Fox Chapel marital residence, the Aspinwall duplex, the Shaler house, and the Seven Springs vacation condominium.

20. Husband does not own any real property.

21. Husband has no liquid assets apart from the fixed draw from his law firm.

22. On December 30, 1998, Judge Baer awarded Wife $10,400 in unallocated child support and APL based on Husband's $16,400 monthly net income (for calendar year 1997). The award was retroactive to April 2, 1998, the day after separation.

23. In addition to the $10,400 per month awarded to Wife, Judge Baer also awarded Wife the monthly net rental income from the Aspinwall duplex in the amount of $700. Thus, wife was awarded $11,100 per month.

24. Wife appealed Judge Baer's support and APL award to the Superior Court of Pennsylvania on May 6, 1999. At the time of appeal, the Equitable Distribution was scheduled to take place before Judge Baer on June 16, 1999. When Judge Baer determined to proceed with the Equitable Distribution despite the appeal, Wife filed an Emergency Application with the Superior Court to stop the Equitable Distribution trial which was granted.

25. Husband filed a cross-appeal to the Superior Court of Pennsylvania.

26. On August 4, 2000, the Superior Court ruled against Wife on all issues that she raised on appeal, and ruled in favor of Husband on his cross-appeal. It remanded the case to the Trial Court for an assignment of an earning capacity for Wife, but did not rule upon Husband's claim that the trial court erred in attributing 65% of the 1997 total net monthly income to Wife, stating that the percentage should be lower after the trial court gives wife an earning capacity. The Superior Court also ruled that the Husband's argument that the Trial Court violated his constitutional rights when it made an advance on equitable distribution to Wife of three real properties without notice to the parties, without the parties being present, and without taking testimony or otherwise having an evidentiary hearing would not be decided because Judge Baer's May 26, 1998 Order was an interim Order.

27. On August 17, 2000, Wife filed an application for Reargument before the Superior Court en banc, which was denied on October 17, 2000.

28. On November 13, 2000, Wife filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on April 2, 2001.

29. The monthly net earning capacity of Wife is as follows:

(1) Year 1998: $2320 per month.

The hearing officer originally determined that Wife had a $35,000 annual earning capacity. Although Judge Baer

granted Wife's exception and found that Wife had no earning capacity, this finding was reversed by the Superior Court. As such, this Court must attribute an earning capacity to Wife. Wife did not return to law school until after 1998. This Court finds that the earning capacity originally found by the hearing officer to be reasonable and attributes that amount to Wife for the year 1998.

(2) Year 1999: $300 per month.

Wife returned to school in 1999 and graduated in 2000. For 1999, the Court finds that Wife had a minimal earning capacity during that time, annualizing any summer earning and attributing at least a part time earning capacity during the school year. The court finds her earning capacity to be $300.

(3) Year 2000: $300 net per month

Although Wife graduated in May 2000, in order to acquire her law degree she had to study for and pass the bar exam. The Court believes that Wife diligently searched for employment during that time and declines to assign any additional earning capacity during the year 2000. As such, her earning capacity for the year 2000 shall be $300.

(4) Year 2001: $2320 net per month.

The Court finds that Wife diligently searched for legal employment in the year 2001; however, she was unsuccessful until September 2001. Nevertheless, the Court finds that Wife could have acquired non-legal employment during the 9 months following graduation while she continued to look for employment. The Court declines to assign an earning capacity of $45,000 as requested by Husband. Instead, the Court assigns the original "non-legal" earning capacity found by the hearing officer in 1998 to Wife - $35,000 per year or $2320 net.

30. Wife received $700 net rental income from the Aspinwall duplex; however, refinancing after December 1999 negated that amount as a net income receipt.

31. Wife's monthly net income, Wife's monthly net earnings capacity, is as follows:

1998: $3020 ($700+$2320=$3020)

1999: $1,000 ($700+$300=$1,000)
2000: $300
2001: $2320

32. Husband's net monthly earnings are as follows:
1998: $12,356
1999: $11,047
2000: $12,343
2001: $12,343

33. Although wife argued at trial that the Court should not assume that Husband's retirement contribution was mandatory on an ongoing basis, no evidence was presented that it was not.

34. Support should be calculated as follows:
4/1/98 to 1/19/99: $9215 per month; $88556
1/20/99 to 12/31/99: $4171 per month; $47,495
1/1/00 to 12/31/00: $4900 per month; $58,800
1/1/01 to 9/1/01: $4635 per month; $37,080
Total: $231,931

35. Direct payments made by Husband. The stipulated date of separation is April 1, 1998. As such, Husband was in the home for one fourth of 1998. Based upon Husband's request for credit on arrearages, he should receive the following credit:

a. Three quarters of real estate taxes or 75% of $4146.00 $3109
b. All requested payments on fire insurance and utilities. $492
c. All requested payments on utilities: $83
d. 40% of IRS payment: $2071.
Total: $5,755

36. The party's minor child attends Oakland Catholic. Prior to the modification, the tuition was included in Wife's APL/child support payment. With the above reduction in APL/support, this is no longer true. Husband shall therefore be responsible for the sum of $12,450, which Mother alleged was taken from the daughter's account to pay for schooling.

37. For the same reason, the court denies Husband's

request for reimbursement of $2370 of tuition paid prior to that time.

38. Husband also failed to make certain payments as required by Judge Baer's Order of December 1998. Specifically those amounts are:

(1) Life insurance for the children: $17,055
(2) Kemper Midland (H): $1,512
(3) General American Life Policies: $25,890
(4) Total: $44,457

39. Although Wife's expert simply stated that Husband's failure to make the above payments was in violation of the Court Order, some further inquiry may be necessary. The hearing officer's recommendation required that Husband maintain these payments; however, this finding was not disturbed by any subsequent order, and therefore must stand.

40. Husband made the following payments:

(1) Father's payments to family division or PA SCDU:
    i. 1998: $78,300
    ii. 1999: $99,120
    iii. 2000: $96,485
    iv. 1/1/01 to 4/5/01: $23,850
    v. 4/5/01 to 9/1/01: $36,793
(2) IRS Intercept from Father
    i. 1999: $2,788
    ii. 2000: $14,733
(3) Credit owed to Husband: $5,755
(4) Total payments: $357,824

41. In addition to the total amount owed pursuant to paragraph 34 ($231,931), Husband owed an additional sum of $56,907 pursuant to paragraph 36 and 38 for a total amount owing of $288,838.

42. Husband made overpayment to Wife of Combined Child Support and APL in the amount of $31,994 as of September 1, 2001, as follows:

(1) Amount paid by Husband: $357,824
(2) Combined Support and APL obligation as

well as other payments owed: $288,838

(3) Amount of Husband's Overpayment: $68,986

43. The following items of Personal Property were owned by Husband prior to the marriage:

(1) Loveseat from Husband's apartment;

(2) Husband's coin collection

(3) Husband's 2-1/2 dollar gold piece received prior to marriage from Husband's father

(4) Seth Thomas clock from Husband's childhood residence

(5) Husband's piano that he received as a gift from his parents in 3rd grade.

44. The PB&G Partnership Agreement narrowly defines the rights of partners as follows:

(1) The Partnership Agreement restricts the right of partners to dissolve or liquidate the partnership. (Paragraph 14.1)

(2) The Partnership Agreement restricts the ability of a partner to sell, assign, transfer, mortgage, pledge, or otherwise encumber any part of his partnership interest. (Paragraph 12.3)

(3) The Partnership Agreement provides an amount to the partner if he voluntarily withdraws from the partnership, if he becomes disabled, if he dies, or if he retires. (Articles VII, VIII, IX and X of Agreement)

45. In Husband's case, and in the cases of the other Equity Partners, the partnership Agreement provides a clear Partnership interest value.

46. The Partnership Agreement reveals that Husband is not a majority or controlling partner and that Father is one of many Partners.

47. PB&G is an entity that is not publicly or privately traded.

48. The pool of potential buyers for Husband's partnership interest is limited to lawyers, for the law does not

permit a non-lawyer to have an ownership interest in a law firm.

49. Partners have left PB&G, and the amount received by the withdrawing partner was based on the terms of the Partnership Agreement.

50. Husband had an equity partnership interest of $60,000 on December 31, 1998.

51. Although Husband presented evidence that pursuant to the partnership agreement certain amounts should be deducted from the $60,000—specifically, his negative capital account, the Court declines to deduct this amount. The negative capital account fluctuates based upon any particular point in time and does not necessarily reflect actual amounts owed. As such, the Court finds that number to be arbitrary.

52. Husband is obligated to reimburse the PB&G under the Partnership Agreement by the amount of excess draws.

53. Husband's draw for 1996 exceeded the amount of his compensation for 1996 by $42,841.41. Father entered into an agreement obligating him to reimburse PB&G over a ten-year period. Husband is making monthly payments, which include principal and interest, in the amount of $475.63

54. The original debt was in the amount of $42,892. Husband has been paying on the debt since June 1, 1997. The payment schedule on the aforesaid debt shows the balance owed as of April 1, 1998 was in the amount of $35,892.81.

55. The $35,892.81 debt as of April 1, 1998 is a marital debt because the incurring of the debt preceded the date of separation.

56. The marital assets consist of the following:

(1) R/E Fox Chapel: $240,448 (equity)
(2) R/E Aspinwall: $150,000
(3) R/E Shaler: $85,000
(4) Seven Springs (1/2 interest): $29,639
(5) Insurance Policy—General American: $23,575
(6) Insurance Policy—General American:

$16,072

(7) Insurance Policy—General American: $1,825

(8) Insurance Policy—Midland: $2,116

(9) Retirement—Marital Component of 401K: $1,036,277

(10) Retirement—IRA: $206,903

(11) Retirement—IRA: $3,497

(12) Retirement—IRA: $24,381

(13) Jewelry—Wife: $13,750

(14) Jewelry—Husband: $3,250

(15) Household Goods—Wife: $24,626

(16) Household Goods—Husband: $375

(17) Auto—1997 Olds Achieva: $13,000

(18) Auto—1996 Jeep Cherokee: $21,000

(19) Dean Witter Account: $2,796

(20) Dean Witter Account: $61

(21) Willowbrook Country Club Membership Bond: $250

(22) PB&G Husband's interest at 12/31/98: $60,000

(23) TOTAL: $1,958,841

ORDER

AND NOW, this 10th day of April, 2002, it is hereby ORDERED, ADJUDGED AND DECREED after hearing testimony by both parties and their witnesses and considering all the evidence at a trial, the Court enters the following Order:

I. Husband's Petition for Modification

It is ORDERED that Husband's Petition for Modification is GRANTED. Based upon the incomes as stated in the foregoing Findings of Fact, as well as the calculations stated therein, Husband is entitled to a modification.

II. Re-calculation of Arrears

As calculated in the Findings of Fact, Husband has an overpayment through September 1, 2001 of $68,986. In light of the recalculation set forth above, it is further ORDERED

as follows:

Husband is not in arrears with respect to his child support and APL obligation; The Domestic Relations Section of Allegheny County is to advise the consumer credit bureau that Joseph J. Bosick has paid in full any and all support obligations. Any Orders of the Court that freeze the assets of Joseph J. Bosick are vacated.

III. Wife's Request for Fees and Expenses Resulting from Husband's Failure to Pay Full Support

In view of the determination that Husband overpaid support, Wife's request for counsel fees and other expenses resulting from Husband's failure to pay the full award of APL/Support is denied.

IV. Equitable Distribution

The Court has considered all of the relevant factors in making a division of marital property. The marriage was a lengthy one, Wife was a stay-at-home mother for many years, and although she recently returned to the work force, it is doubtful that, she will be about to reach the earning capacity of Husband. There is credible evidence, also, that Husband's law practice may never be as prosperous as it once was and that Husband is approaching his retirement years. Those factors, as well as others, dictate a 60/40 division in favor of Wife.

It is ORDERED that the marital property, as set forth in the Findings of Fact, be divided such that Wife receives (60%) sixty percent and Husband receives (40%) forty percent.

With regard to specific items of Personal Property, it is Ordered that Wife be awarded the following:
-Furniture and household goods: Furniture and household goods located in the marital residence except the specific items awarded to Husband as described below.
-Vehicle: 1997 Oldsmobile Achieva automobile

-Jewelry: Ladies gold bracelet; ladies engagement ring; earring jackets; earrings; tennis bracelet; Ring (diamond cluster design); pendant (diamond cluster design); pearls; bracelet (cultured pearl design)
-Whole Life Policies of Insurance: General American Policy No. 3231152; General American Policy No. 3231153; General American Policy No. 1989682; Midland Insurance Policy No. 670842.

With regard to specific items of Personal Property, it is ORDERED that Husband be awarded the following:
-Furniture and Household goods: The following items which are presently in the custody and control of Wife are to be delivered to Husband within 30 days of the date of this Order:

Husband's desk: $300
Husband's desk chair: $145
The Irish Hurling painting: $125
The Amsterdam painting: $300
Fifty Percent of all Waterford crystal, as mutually agreed: $400
Wedding present of photographs above living room fireplace given by Husband's cousin, Tom O'Dwyer, as a wedding gift $160
Wedding present of belique china given by Husband's Aunt $60.
Loveseat in living room that came from Husband's former apartment: $500
Fifty percent of family photographs as mutually agreed
Husband's coin collection
Husband's weights, dumbbells, benches, mirrors, speed bag and heavy bag $165
Stihl chain saw: $35
Some of Husband's tools, as mutually agreed
Husband's personal files
Pendant that contains the gold coin won by

Husband's Father in a grade school spelling contest $200; and
Seth Thomas clock from Husband's childhood residence: $50

***Husband is also awarded marital property over which he presently has possession.**

Vehicle: 1996 Jeep Grand Cherokee vehicle
Jewelry: Pendant with two and one-half dollar gold coin; Man's ring.

The Marital estate has been calculated at $1,958,841. Wife shall receive 60% of this amount or the sum of $1,175,304. From this we should deduct the following items which have been awarded to Wife.

Less R/E Fox Chapel: $240,448
Aspinwall: $150,000
Shaler: $85,000
Seven Springs: $29,639
General American: $23,575
General American: $16,072
General American: $1,825
Midland: $2,116
IRA: $24,381
Jewelry: $13,480
Household Goods: $22,136
1997 Olds Achieva: $13,000
Dean Witter Account: $2,796
Total: $624,468

From this amount we should also deduct 40% of the marital debt, which is $35,893 or $14,357, as well as the amount of Husband's overpayment as of September 1, 2001 of $68,986. This amount is calculated as follows: Wife's share: 1,175,305; Property in Wife's Possession: $624,468; Debt: $14,357; Overpayment: $68,986. Total Due: $467,494.

This amount shall be transferred to wife via QDRO from Husband's retirement funds.

The Court recognizes that the amounts in the retirement funds may have fluctuated because of market

conditions. Each party shall receive his or her percentage share of the gain or bear his or her percentage of the loss. Counsel for both parties are to calculate this amount and to make appropriate adjustments to the funds due to the Wife.

V. Alimony

The Court has carefully considered the factors for an alimony award and finds alimony to be appropriate for a short time in this case. Specifically, the Court had focused on the duration of the marriage, contribution to the increased earning power of the other party, the contribution of Wife as a homemaker and the fact that this is unlikely that Wife, given her age and the fact that she did not work during the marriage, will ever reach Husband's earning potential.

However, the Court also finds that Husband's income during the pendency of this action and possibly into the foreseeable future has and will decline from the years prior to separation. Wife, unfortunately, failed to cut back on various expenses and, in fact, incurred significant debt during the course of this action. Wife continues to maintain the Seven Springs Condominium and continues to reside in the Fox Chapel residence. The other trappings of the parties' previous lifestyle are similarly difficult to maintain, given Husband's decline in income, as well as the breakup of the marriage. As such, Wife's assertion that $10,000 per month is a reasonable need must fail.

Additionally, the party's minor child will soon be finishing high school and Wife's current need to maintain the marital home will cease to be a reasonable need. This is particularly true as the cost of maintaining this home, with its mortgages, taxes, maintenance, etc., is a large portion of Wife's budget. Wife has been receiving APL for almost 4 years, during which time she returned to school to acquire her law degree and during which time Husband paid additional funds because Wife had virtually no earning capacity.

Nevertheless, Wife is in need of a short period of alimony so that she can make the transition from a dependent

spouse with minor children to that of a single career woman. The Court therefore awards the sum of $2,200 per month in alimony until April 15, 2006. This amount shall be modifiable according to law. Alimony Pendente Lite terminates as of April 15, 2002.

Wife has just recently become employed and will need some time to build a law practice. Although this Court believes that Wife does not have time to ever reach Husband's earning potential, she should be able to eventually support herself through her own wages.

In the event, Wife appeals this decision, the order of APL is suspended pending resolution of this matter by the Superior Court. In the event the Superior Court reverses or remands the matter, this Court will consider lifting this suspension retroactive to the date of suspension.

In the event that Husband appeals this decision, any cross appeal by Wife will not be considered an appeal triggering suspension of the APL.

VI. Counsel Fees

Wife's Counsel fees were substantial in this case. However, despite Wife's claims that a large portion of these fees were incurred because of Husband's contempt, as was stated earlier, Husband actually overpaid support.

Further, as the Court indicated in its Findings of Fact, the Court believes that Wife has been overly litigious in this matter. Wife appealed the Court's initial support Order attempting to take the matter to the Pennsylvania Supreme Court. Although this in itself may be arguably appropriate, Wife attempted to delay resolution of the economic matters, including Husband's modification request, while requesting contempt hearings. Also, despite Wife's social prominence in the community, she opposed Husband's Petition to Seal the Record, giving no reasons for such opposition.

Additionally, Wife received substantial advances in this case and should have been able to pay counsel fees as the case progressed. As such, Wife's claim for counsel fees and

costs is denied.

VII. Child Support

Wife acquired employment in September 2001. Although the parties filed a stipulation indicating that Wife had acquired employment and indicated her hourly rate, the Court has no evidence of her actual income. Likewise, the Court has no evidence of Husband's final 2001 income.

The parties are directed to schedule a support hearing for the purposes of determining alimony and child support, based upon the parties' incomes. Any award shall be retroactive to September 1, 2001 and shall continue through April 15, 2002. After that time, the hearing officer shall calculate child support only, based upon the parties' incomes and Wife's alimony award.

Husband shall be responsible for payment of Jennifer's high school tuition until she graduates. Any overpayment/arrearages resulting from the hearing officer's recalculation of support shall be added/subtracted from the funds transferred to Wife from Husband's retirement fund.

VIII. Additional Claims

All other claims by the parties are dismissed.

This order shall be considered a Final Order of Court.
By the Court, /s/ Kim Eaton, Judge
Dated April 10, 2002

IN THE SUPERIOR COURT OF PENNSLVANIA

1522 WDA 2002
1544 WDA 2002

MARY ELLEN BOSICK *Pro se,*
Appellant,

v.

JOSEPH J. BOSICK,
Appellee.

BEFORE:
STEVENS, ORIE MELVIN AND CAVANAUGH, JJ.

MEMORANDUM **FILED February 12, 2004**

Mary Ellen Bosick (Wife) appeals and Joseph J. Bosick (Husband) cross appeals from the Order entered July 29, 2002 following reconsideration of the trial court's April 10, 2002 findings of fact and order which awarded Wife 60% of the marital estate, alimony through April 15, 2006, modified child support and denied Wife's request for counsel fees. Upon review, we affirm in part and reverse in part.

The facts and procedural history were accurately summarized by the trial court as follows:

Wife and [Husband] were married on April 6, 1974, separated on April 1, 1998, and divorced on December 29, 2000. At the time of trial, Wife was 52 years old and Husband was 55 years of age. Three children were born of the marriage. Two have reached the age of majority. Daughter Jennifer was a senior in high school at the time of trial and resided with Wife in the parties' marital home in Fox Chapel, Pennsylvania.

Wife earned a Bachelor of Science degree from the University of Dayton in 1971, a Masters of Education Degree in Curriculum and Supervision form the University of Pittsburgh in 1975 and a J.D. from the University of Pittsburgh in 2000. Wife was employed as a teacher in the Fox Chapel School District from 1972 until 1977. She was a member of the Fox Chapel School Board from 1983 to 1987. She managed a lawn equipment business for two years beginning in 1988. She acquired employment as an attorney on September 10, 2001 and is currently working thirty hours per week earning $10 per hour. Wife's monthly net income for support purposes was set at $[2,320] for 1998, $1,000 for 1999, $300 for 2000 and $2,320 for 2001. ... She has always been extensively involved in volunteer activities. Wife owns solely in her name the marital residence, a condominium at Seven Springs, a duplex in Aspinwall and a house in Shaler.

Husband is one of nineteen equity partners in the law firm of Pietragallo, Bosick and Gordon (PB&G). As of December 31, 1998, Husband had an 8.2% interest in the partnership. At the time of trial, his percentage was 6.3%. His net monthly earnings were $12,343 in 2000 and 2001. This is a substantial reduction in income of five years earlier. His draw in 1996 exceeded the amount of his compensation for that year by $42,841.41. Husband is obligated to reimburse PB&G by that amount in monthly installments of $475.63 over ten years. Husband's monthly net income for purposes of support was found to be $12,356 for 1998, $11,047 for 1999, $12,343 for 2000 and $12,343 for 2001. Husband does not own any real property. Husband has no liquid assets apart from the fixed draw from his law firm.

Based upon the respective monthly net incomes of the parties, Husband's support obligation from April 1, 1999 through September 1, 2001 was $231,931. Considering payments made by Husband, payments which Husband should have made and credits owed to him, Husband was overpaid to Wife for combined child support and APL in the amount of $31,994 as of September 1, 2001.

By Order dated April 10, 2002, this court granted Husband's request for modification of child support, denied Wife's request for counsel fees as sanctions for Husband's failure to pay support, awarded Wife 60% of a marital estate valued at $1,958,841, awarded alimony to Wife of $2,200 per month through April 15, 2006 and denied Wife's claim for counsel fees and costs. Included in the marital estate and awarded to Wife were three General American life insurance policies with a cash surrender value of $41,472. Both parties presented motions for reconsideration, which were granted. By Order dated July 29, 2002, the court changed the value of one asset and denied all other issues raised by the parties on reconsideration. [Wife] timely appealed and [Husband] cross-appealed.

Trial Court Opinion, 1/8/03 at 1-3.

Wife presents four questions for our review:

I. Whether the trial court, by misapplication of law or failure to follow proper procedure, abused its discretion in listing and valuing marital property "absent" competent and/or "contrary" to record evidence.

II. Whether the trial court erred in finding that self-employed Appellee's 401k contributions were non-voluntary.

III. Whether the trial court, under the facts sub judice, exceeded its authority in suspending Appellant's alimony pendent elite during the pendency of the parties' cross appeals.

IV. Whether the judgment exercised by the trial court was manifestly unreasonable in failing to award equitable counsel fees to Appellant.

Wife's brief at 3.

At the outset, we recognize that Wife raises a series of claims in her brief in a section entitled, "Appellant First Takes Exception With the Validity of the Court Orders Below." Wife's Brief at 9. We find the issues raised therein

were not included in Wife's 1925(b) statement and are, therefore, waived. See Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998)(finding issues not raised in the 1925(b) statement are waived); Chen v. Chen, 2003 PA Super 497 (Filed December 19, 2003)(finding that the holding in Lord has been applied to family law cases).

Turning to Wife's claims, she first argues that the trial court erred in including the cash surrender value of three General American life insurance policies as marital property. She argues that she placed the policies in an irrevocable trust for the benefit of the children, and she served as the trustee. Wife's brief at 13-14. Although Husband agrees the parties stipulated to the cash surrender value of the policies, he claims he never stipulated to the existence of an irrevocable trust for the benefit of the children. Husband's brief at 18-19.

"Our review of an equitable distribution order is limited as such awards are within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." Anderson v. Anderson, 822 A.2d 824, 827 (Pa. Super. 2003)(*citing* Fishman v. Fishman, 805 A.2d 576, 578 (Pa. Super. 2002)). "An abuse of discretion will be found by this Court only if the trial court failed to follow proper legal procedures or misapplied the law." Id. The finder of fact is entitled to weigh the evidence presented and assess its credibility. Williamson v. Williamson, 586 A.2d 967, 972 (Pa. Super. 1991). "The fact finder is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below." Fonzi v. Fonzi, 633 A.2d 634, 637 (Pa. Super. 1993).

The definition of marital property includes "all property acquired by either party during the marriage." 23 Pa. C.S.A. § 3501(a). However, the parties can exclude certain property as marital by valid agreement. 23 Pa. C.S.A. § 3501(a)(2); see Robbins v. Kristofic, 643 A.2d 1079 (Pa. Super. 1993), *appeal denied,* 539 Pa. 654, 651 A.2d 541 (1994) (where parties agreed an irrevocable trust was established exclusively for the use and benefit of the children

rather than as marital property).

In the present case, Wife testified that in 1993 she placed the policies in trust for the benefit of the children. See N.T. Trial, 4/4/01, at 317. However, the trial court specifically found that no written trust document was produced at trial to support Wife's claim. Trial Court Opinion, 1/8/03, at 5. The trial court also determined that no evidence was produced establishing the assets were used exclusively for the children. Id. Therefore, because Wife was the named beneficiary on the policies, the trial court determined the cash surrender value of the policies was marital property which was ultimately awarded to Wife.

Wife contends that Husband admitted that the insurance policies were transferred to a trust. Wife's brief at 14, footnote 3. In support of her claim Wife references a single page of the Reproduced Record. R.R. at 46a. Upon review of the certified record in this case, we have determined that Wife appears to be relying on Husband's Petition for Modification and Corresponding Motion for Credit on Arrearages filed on January 29, 1999. See C.R. at 81, p.4. Wife claims that in that filing, Husband conceded that he created a deed of trust with Wife in July 1993 and transferred the insurance policies to the trust with the trust as beneficiary. Id.

In the present case, the trial court relied on the evidence presented at the April 4, 2001, April 5, 2001 and June 27, 2001 hearings and determined that neither trust documents nor other evidence was produced at trial to support Wife's claim. Since Wife is referencing Husband's 1999 filing for the first time on appeal, we find no abuse of the trial court's discretion in determining the insurance policies were marital property.

Wife next contends that the trial court erred in determining that a portion of Husband's contributions to his 401(k) plan were non-voluntary and, therefore, excludable for purposes of determining his net monthly income. Wife argues that the non-voluntary contributions should be

included as part of Husband's net income because he can borrow from the pension plan without penalty. Wife's brief at 17.

It is well settled that the trial court must include any voluntary contributions that a party makes to his retirement plan as income for support purposes. Portugal v. Portugal, 798 A.2d 246 (Pa. Super. 2002). However, non-voluntary contributions are excludable. Id.

In terms of background information, it appears that on March 18, 1998, the hearing officer accepted Wife's argument that all of Husband's contributions to the pension plan were voluntary. As such, the hearing officer included all of Husband's contributions as income in its recommendation. However, by order entered December 31, 1998, the trial court overruled that portion of the hearing officer's decision and determined that there was a mandatory component as well as a voluntary component. Trial Court Opinion, 12/31/98, at 2. Specifically, the trial court determined that the Husband's $20,000 payment was a non-voluntary contribution and should have been deducted from his gross income and that his $9,500 contribution was voluntary and properly included in his income. Id. Wife appealed, and a panel of this Court agreed with the trial court that the $20,000 contribution was non-voluntary and should have been deducted from Husband's gross income for support purposes. See Bosick v. Bosick, 764 A.2d 1117 (Pa. Super. 2000) (unpublished memorandum), appeal denied, 565 Pa. 634, 771 A.2d 1276 (2001).

Upon review, Wife appears to be raising the identical issue which was previously litigated before a panel of this Court. Because the trial court determined that Wife did not present any further evidence on the amount or nature of Husband's mandatory contributions, we need not revisit this issue in this appeal. Trial Court Opinion, 1/8/03, at 4. With respect to Wife's assertion that Husband can borrow from his plan without penalty, she fails to cite to any case law or statutory law requiring Husband to do so. Accordingly, we

find her claim must fail. Next, Wife argues the trial court should not have suspended her alimony pendent elite (APL) payments during this appeal because a divorce is not final for purposes of APL until all appeals are exhausted. She claims her right to appeal must be equitably protected, particularly since she received almost no liquid assets.

An appellate court's standard of review for awards of alimony pendent elite (APL) is well settled. If the order is bolstered by competent evidence, the order will not be reversed absent an abuse of discretion. Isralsky v. Isralsky, 824 A.2d 1178, 1188 (Pa. Super. 2003). APL is allowable to either spouse during pendency of a divorce action. 23 Pa. C.S.A. § 3702.

The obligation to pay alimony pendente lite continues following the entry of the bifurcated divorce decree until all economic issues have been resolved. This court has held that this obligation continues even after the entry of a final decree in equitable distribution when an appeal remains pending and terminates only after all litigation has ended. We have also held, however, that alimony pendent elite may be terminated before the litigation is concluded where the recipient has acquired assets or income which sufficiently equalizes the financial ability of the parties to pursue the action. Jayne v. Jayne, 663 A.2d 169, 176 (Pa. Super. 1995)(citations and footnote omitted).

Pursuant to the trial court's April 10, 2002 Order, Wife was awarded alimony in the amount of $2,200 per month, and APL was terminated as of April 15, 2002. However, the trial court indicated that APL would be suspended in the event that Wife filed an appeal from the trial court's order. The trial court did not disturb this finding on reconsideration. Order, 7/29/02. In its opinion, the trial court stated:

As previously discussed, Wife has sufficient assets and income available to her through equitable distribution, alimony and her own earning capacity that she can litigate the case as she chooses. Wife received the sum of

$1,175,304 in equitable distribution. Wife has been receiving APL for almost four years, during which time she returned to school to acquire her law degree and during which time Husband paid additional funds because Wife had virtually no earning capacity. She was awarded alimony of $2,200 per month through April 15, 2006. She is currently employed as an attorney. Although Wife's income is less than that of Husband, Wife nonetheless has sufficient assets to equalize her financial position and allow her to pursue this litigation on par with Husband.
Trial Court Opinion, 1/8/03, at 7-8.

Upon review, we find Wife has adequate assets and income available to her through equitable distribution, alimony and her earning capacity so that she could further litigate this matter as she chooses. Nemoto v. Nemoto, 620 A.2d 1216, 1221-1222 (Pa. Super. 1993). Finally, Wife claims she should have been awarded counsel fees because she received almost no liquid assets. She argues that the advance on equitable distribution came primarily in the form of real property, which had equity but produced little income. Although she concedes she received nearly one half million dollars in assets, she claims she derived little income from paying her counsel fees on an ongoing basis. Wife's brief at 23. She also focuses on the disparity in the parties' income and Husband's ability to pay. Id. at 25.

On review, we examine whether the court below abused its discretion. The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial [dis]advantage; the parties must be 'on par' with one another. Moreover, counsel fees are awarded only upon a showing of need.
Brody v. Brody, 758 A.2d 1274, 1281 (Pa. Super. 2000) (citations and quotation marks omitted); Anzalone v. Anzalone, 835 A.2d 773 (Pa. Super. 2003). "Counsel fees are awarded based on the facts of each case after a review of all the relevant factors." Perlberger v. Perlberger, 626 A.2d

1186, 1207 (Pa. Super. 1993), appeal denied, 536 Pa. 628, 637 A.2d 289 (1993). "These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution." Id.

In the instant case, the trial court rejected Wife's claim for attorney's fees finding that she failed to demonstrate the requisite need. Trial Court Opinion, 1/8/03, at 6. The trial court determined that Wife was awarded APL and received substantial advances in this case. The trial court further found that Wife was awarded sufficient assets through equitable distribution to pay her own counsel fees. Id. Although the trial court acknowledged that Husband continues to have a higher income than Wife, it found that Husband's ability to pay was not established in light of his declining income and significant expenses. Id. The trial court also specifically found that Wife's litigious approach caused a large portion of her fees. Id. at 6-7. Based upon our review, we conclude that the trial court did not abuse its discretion in denying an award of counsel fees to Wife.

Husband presents two questions for our review in his cross appeal:

I. Whether the trial court's refusal to reopen the record to allow evidence of the true market value of the marital residence was unjust, improper, and worked an unfair penalty on Husband.

II. Whether the trial court erred in reducing Husband's APL overpayment by the amount of life insurance premiums totaling $44,577, because the court had specifically made these payments a component of Husband's overall monthly alimony pendente lite obligation to Wife.

[. . .] sold the marital residence on December 18, 2001 for $550,000. The difference between the stipulated value and the sale price was $135,000. Upon the sale of the residence, Husband moved to reopen the record and introduce the sale

price or the actual market value of the marital residence. Wife opposed the motion, and the trial court denied Husband's request.

"In matters of equitable distribution, the trial court has broad equitable powers to effectuate economic justice between the parties and we will not reverse an award absent an abuse of that discretion." Marra v. Marra, 831 A.2d 1183, 1186-87 (Pa. Super. 2003), appeal denied, 563 Pa. 702, 761 A.2d 550 (2000). The Divorce Code does not specify a particular method of valuing assets. The trial court must exercise discretion and rely on the estimates, inventories, records of purchase prices, and appraisals submitted by both parties. Smith v. Smith, 653 A.2d 1259, 1265 (Pa. Super. 1995), appeal denied, 541 Pa. 641, 663 A.2d 693 (1995). Valuations should be made as close as possible to the property distribution date. Powell v. Powell, 577 A.2d 576, 583 (Pa. Super. 1990). In the present case, the parties stipulated to the value of the marital residence which was accepted by the trial court for purposes of equitable distribution.

A stipulation is a declaration that the fact agreed upon is proven. A valid stipulation must be enforced according to its terms. Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court they become the law of the case. Osial v. Cook, 803 A.2d 209, 216 (Pa. Super. 2002)(citation omitted).

In denying Husband's request to reopen the record, the trial court relied on Stinner v. Stinner, 446 A.2d 651 (Pa. Super. 1982). There, a panel of this Court found that absent fraud or overreaching, the trial court should have accepted appellee's stipulation which was concurred in by appellant regarding the actual amount in controversy which was subject to garnishment. In the present case, the trial court determined that Husband was bound by the stipulated value of the marital residence since he failed to introduce any

evidence of fraud or overreaching. Trial Court Opinion, 1/8/03, at 9-10. Unlike Stinner, Husband contends he mistakenly entered into the stipulation. He requested to open the record to present new evidence regarding the actual market value of the marital residence before any finding of fact or order were rendered in this case. Upon review, we find the trial court abused its discretion in relying on the stipulated value since it reflected a stale and inaccurate value and failed to achieve economic justice in this matter. Based upon the substantial difference between the stipulated and actual value and the timing of Husband's request, we are constrained to remand the case for the trial court to allow the admission of evidence of the market value of the marital residence.

In Husband's final claim, he essentially argues that the trial court erred in determining that insurance payments were to be paid separate from and in addition to his monthly support obligation to Wife. In his brief, he points out several inconsistencies in the record. He claims that over $44,000 in unpaid insurance premiums should not have been deducted from his APL overpayment.

We agree with Husband's that there are inconsistencies in the record regarding this issue. See Hearing Officer Report and Recommendation, 3/18/98; Trial Court Opinion, 12/30/98; Findings of Fact, 4/10/02, No. 39, at 10; Trial Court Opinion, 1/8/03, at 8-9. Upon further review of the trial court's January 8, 2003 opinion, we are unable to determine the reasons why it reverted to the hearing officer's recommendation requiring the separate payment for insurance. Because we are unable to find support for the trial court's order on this issue, we reverse and remand for further proceedings.

Order affirmed in part and reversed in part. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

/s/ Eleanor Valecko, Deputy Prothonotary.

THE SUPERIOR COURT OF PENNSYLVANIA

NO. 1522 and 1544 WDA 2002

IN RE: MARY ELLEN BOSICK V JOSEPH J. BOSICK

ORDER OF COURT

Mary Ellen Bosick's June 20, 2003 "petition to supplement brief" is DENIED.

/s/ Eleanor R. Valecko, Deputy Prothonotary

Date: June 24, 2003

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 172 & 173 WAL 2004

MARY ELLEN BOSICK *Pro se*,
Petitioner,

v.

JOSEPH J. BOSICK,
Respondent.
:

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 21st day of July 2004, the Petition for Allowance of Appeal is hereby **DENIED.**

Mr. Justice Baer did not participate in the consideration or decision of this matter.

(4)

Supreme Court, U.S.
FILED
05-419 SEP 29 2005
OFFICE OF THE CLERK

APPENDIX II
STATUTES

No. _____

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI, *Pro Se,*
Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.,*
Respondent/self-employed plan participant and trustee,
Law firm employer- plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

Mary Ellen Chajkowski, *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

APPENDIX II

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STATUTORY PROVISIONS

Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq. (2005).

29 USCS § 1003 (2005)

(a) Except as provided in subsection (b) or (c) and in sections 201, 301, and 401 [29 USCS §§ 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained--

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this title shall not apply to any employee benefit plan if--

(1) such plan is a governmental plan (as defined in section 3(32) [29 USCS § 1002(32)]);

(2) such plan is a church plan (as defined in section 3(33) [29 USCS § 1002(33)]) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1986 [26 USCS § 410(d)];

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 3(36) [29 USCS § 1002(36)]) and is unfunded.

The provisions of part 7 of subtitle B [29 USCS §§ 1181

et seq.] shall not apply to a health insurance issuer (as defined in section 733(b)(2) [29 USCS § 1191b(b)(2)]) solely by reason of health insurance coverage (as defined in section 733(b)(1) [29 USCS § 1191b(b)(1)]) provided by such issuer in connection with a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]) if the provisions of this title do not apply to such group health plan.

(c) If a pension plan allows an employee to elect to make voluntary employee contributions to accounts and annuities as provided in section 408(q) of the Internal Revenue Code of 1986 [26 USCS § 408(q)], such accounts and annuities (and contributions thereto) shall not be treated as part of such plan (or as a separate pension plan) for purposes of any provision of this title other than section 403(c), 404, or 405 [29 USCS § 1103(c), 1104, or 1105] (relating to exclusive benefit, and fiduciary and co-fiduciary responsibilities) and part 5 (relating to administration and enforcement). Such provisions shall apply to such accounts and annuities in a manner similar to their application to a simplified employee pension under section 408(k) of the Internal Revenue Code of 1986 [26 USCS § 408(k)].

29 USCS § 1021 (2005)

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USCS § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan--

(1) a summary plan description described in section

102(a)(1) [29 USCS § 1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 USCS §§ 1024(b)(3), 1025(a) and (c)].

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 USCS § 1024(a)], file with the Secretary--

(1) the annual report containing the information required by section 103 [29 USCS § 1023]; and

(2) terminal and supplementary reports as required by subsection (c) of this section.

(c) Terminal and supplementary reports.

(1) Each administrator of an employee pension benefit plan which is winding up its affairs (without regard to the number of participants remaining in the plan) shall, in accordance with regulations prescribed by the Secretary, file such terminal reports as the Secretary may consider necessary. A copy of such report shall also be filed with the Pension Benefit Guaranty Corporation.

(2) The Secretary may require terminal reports to be filed with regard to any employee welfare benefit plan which is winding up its affairs in accordance with regulations promulgated by the Secretary.

(3) The Secretary may require that a plan described in paragraph (1) or (2) file a supplementary or terminal report with the annual report in the year such plan is terminated and that a copy of such supplementary or terminal report in the case of a plan described in paragraph (1) be also filed with the Pension Benefit Guaranty Corporation.

(h) Simple retirement accounts.

(1) No employer reports. Except as provided in this subsection, no report shall be required under this section by an employer maintaining a qualified salary reduction

arrangement under section 408(p) of the Internal Revenue Code of 1986 [26 USCS § 408(p)].

(2) Summary description. The trustee of any simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of such Code [26 USCS § 408(p)] shall provide to the employer maintaining the arrangement each year a description containing the following information:

(A) The name and address of the employer and the trustee.

(B) The requirements for eligibility for participation.

(C) The benefits provided with respect to the arrangement.

(D) The time and method of making elections with respect to the arrangement.

(E) The procedures for, and effects of, withdrawals (including rollovers) from the arrangement.

(3) Employee notification. The employer shall notify each employee immediately before the period for which an election described in section 408(p)(5)(C) of such Code [26 USCS § 408(p)(5)(C)] may be made of the employee's opportunity to make such election. Such notice shall include a copy of the description described in paragraph (2).(i) Notice of blackout periods to participant or beneficiary under individual account plan.

(1) Duties of plan administrator. In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection.

(2) Notice requirements.

(A) In general. The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include--

(i) the reasons for the blackout period,

(ii) an identification of the investments and other rights affected,

(iii) the expected beginning date and length of the blackout period,

(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and

(v) such other matters as the Secretary may require by regulation.

(B) Notice to participants and beneficiaries. Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period.

(C) Exception to 30-day notice requirement. In any case in which--

(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1) [29 USCS § 1104(a)(1)], and a fiduciary of the plan reasonably so determines in writing, or

(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.

(D) Written notice. The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

(E) Notice to issuers of employer securities subject to blackout period. In the case of any blackout period in

connection with an individual account plan, the plan administrator shall provide timely notice of such blackout period to the issuer of any employer securities subject to such blackout period.

(3) Exception for blackout periods with limited applicability. In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable.

(4) Changes in length of blackout period. If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2)(A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A).

(5) Regulatory exceptions. The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

(6) Guidance and model notices. The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

(7) Blackout period. For purposes of this subsection--

(A) In general. The term "blackout period" means, in

connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

(B) Exclusions. The term "blackout period" does not include a suspension, limitation, or restriction--

(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)]),

(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or

(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d)(3)(K) [29 USCS § 1056(d)(3)(K)]), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d)(3)(B)(i) [29 USCS § 1056(d)(3)(B)(i)]).

(8) Individual account plan.

(A) In general. For purposes of this subsection, the term "individual account plan" shall have the meaning provided such term in section 3(34) [29 USCS § 1002(34)], except that such term shall not include a one-participant retirement plan.

(B) One-participant retirement plan. For purposes of subparagraph (A), the term "one-participant retirement plan" means a retirement plan that--

(i) on the first day of the plan year--

(I) covered only the employer (and the employer's spouse) and the employer owned the entire business (whether or not incorporated), or

(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986 [26 USCS § 1361(a)])),

(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 [26 USCS § 410(b)] (as in effect on the date of the enactment of this paragraph [enacted July 30, 2002]) without being combined with any other plan of the business that covers the employees of the business,

(iii) does not provide benefits to anyone except the employer (and the employer's spouse) or the partners (and their spouses),

(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and

(v) does not cover a business that leases employees.

(j) Cross reference. For regulations relating to coordination of reports to the Secretaries of Labor and the Treasury, see section 3004 [29 USCS § 1204].

29 USCS § 1022 (2005)

§ 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and

comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]), whether a health insurance issuer (as defined in section 733(b)(2) [29 USCS § 1191b(b)(2)]) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this Act and the

Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

29 USCS § 1023 (2005)

§ 1023. Annual reports

(a) Publication and filing.

(1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include--

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this title is maintained by--

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 3(16)(B) [29 USCS § 1002(16)(B)],

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3) (A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 104(b)(3) [29 USCS § 1024(b)(3)] present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)] a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his

reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this title, the term "qualified public accountant" means--

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4) (A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 104(a)(2) [29 USCS § 1024(a)(2)], a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section--

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience

under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this title, the term "enrolled actuary" means an actuary enrolled under subtitle C of title III of this Act [26 USCS § 7701; 29 USCS §§ 1241, 1242].

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under section 103(b) [29 USCS § 1023(b)] as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) Financial statement. An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of

the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in

connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or

similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is--

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from

filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator. The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) Actuarial statement. With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other

plan, which is an individual account plan, (B) a plan described in section 301(b) [29 USCS § 1081(b)], or (C) a plan described both in section 4021(b) [29 USCS § 1321(b)] and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 301(a) [29 USCS § 1081(a)(1), (2), (3), (4), (5), (6), or (7)]) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302 [29 USCS § 1082].

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 [29 USCS § 1082] and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefit commitments, as defined in section 4001(a)(16) [29 USCS § 1301(a)(16)]), and

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary--

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) [29 USCS § 1082(c)(3)] (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) A statement by the actuary which discloses--

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future,

but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 70 percent of the current liability under the plan (within the meaning of section 302(d)(7) [29 USCS § 1082(d)(7)]), the percentage which such value is of such liability.[.]

(12) Such other information regarding the plan as the Secretary may by regulation require.

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more

frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits. If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating--

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or

plans, a detailed statement of such costs.

§ 1025. Reporting of participant's benefit rights

(a) Statement furnished by administrator to participants and beneficiaries. Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information-

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports. In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12-month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement and notification of forfeitable benefits. Each administrator required to register under section 6057 of the Internal Revenue Code of 1986 [26 USCS § 6057] shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section [26 USCS § 6057(a)(2)(C)], an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of such Code [26 USCS § 6057(a)(2)]. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations. Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury.

29 USCS § 1027 (2005)

§ 1027. Retention of records

Every person subject to a requirement to file any report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) of this title [29 USCS § 1024(a)(2) or (3)] shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) [29 USCS § 1024(a)(2) or (3)].

§ 1029. Forms

(a) Information required on forms. Except as provided in subsection (b) of this section, the Secretary may require that any information required under this title to be submitted to him, including but not limited to the information required to be filed by the administrator pursuant to section 103(b)(3)

and (c) [29 USCS § 1023(b)(3) and (c)], must be submitted on such forms as he may prescribe.

(b) Information not required on forms. The financial statement and opinion required to be prepared by an independent qualified public accountant pursuant to section 103(a)(3)(A) [29 USCS § 1023(a)(3)(A)], the actuarial statement required to be prepared by an enrolled actuary pursuant to section 103(a)(4)(A) [29 USCS § 1023(a)(4)(A)] and the summary plan description required by section 102(a) [29 USCS § 1022(a)] shall not be required to be submitted on forms.

(c) Format and content of summary plan description, annual report, etc., required to be furnished to plan participants and beneficiaries. The Secretary may prescribe the format and content of the summary plan description, the summary of the annual report described in section 104(b)(3) [29 USCS § 1024(b)(3)] and any other report, statements or documents (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees. Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) [29 USCS § 1102(a)] or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) [28 USCS § 1102(c)(3)].

(b) Exceptions. The requirements of subsection (a) of this section shall not apply--

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan--

(A) some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1986 [26 USCS § 401(c)(1)]; or

(B) which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1986 [26 USCS § 408];

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code [26 USCS § 401(f) or 408(h)], whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) and which is not subject to any of the following provisions of this Act--

(A) part 2 of this subtitle [29 USCS §§ 1051 et seq.],

(B) part 3 of this subtitle [29 USCS §§ 1081 et seq.], or

(C) title IV of this Act; or

(5) to a contract established and maintained under section 403(b) of the Internal Revenue Code of 1986 [26 USCS §

403(b)] to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code [26 USCS § 403(b)(7)].

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this Act.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets.

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 and 4044 [29 USCS §§ 1342, 1344] (relating to termination of insured plans), or under section 420 of the Internal Revenue Code of 1986 [26 USCS § 420] (as in effect on the date of the enactment of the American Jobs Creation Act of 2004 [enacted Oct. 22, 2004]), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of Title IV [29 USCS §§ 1381 et seq.]--

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of the Internal Revenue Code of 1986 [26

USCS § 401(a)] or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code [26 USCS § 501(a)]), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of the Internal Revenue Code of 1986 [26 USCS § 401 or 403(a)], and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of the Internal Revenue Code of 1986 [26 USCS § 404], then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

29 USCS § 1104 (2005)

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USCS §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the

interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary.

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and (B) no person who is otherwise a fiduciary shall be liable under this part [29 USCS §§ 1101 et seq.] for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of the Internal Revenue Code of 1986 [26

USCS § 408(p)], a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 101(g) [29 USCS § 1021(g)], shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

[. . .]

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (l);

[. . .]

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606, section 101(e)(1), or section 101(f) [29 USCS § 1166(a)(1) or (4), § 1021(e)(1), or § 1021(f)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a

separate violation.

[. . .]

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USCS § 1021(d)] with respect to any participant or beneficiary or who fails to meet the requirements of section 101(e)(2) [29 USCS § 1021(e)(2)] with respect to any person or who fails to meet the requirements of section 302(d)(12)(E) [29 USCS § 1082(d)(12)(E)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $ 100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

[. . .]

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought

by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USCS §§ 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a

judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USCS § 4975].

(m) Penalty for improper distribution. In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 USCS § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $ 10,000 for each such distribution.

Internal Revenue Code, 26 U.S.C.A. § 401 (2004).

(k) Cash or deferred arrangements.--
(1) General rule.--A profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.
(2) Qualified cash or deferred arrangement.--A qualified cash or deferred arrangement is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of subsection (a)--
(A) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash;
(B) under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election--
(i) may not be distributable to participants or other beneficiaries earlier than--
(I) severance from employment, death, or disability,
(II) an event described in paragraph (10),
(III) in the case of a profit-sharing or stock bonus plan, the attainment of age 59 1/2 , or
(IV) in the case of contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies, upon hardship of the employee, and
(ii) will not be distributable merely by reason of the completion of a stated period of participation or the lapse of a fixed number of years;
(C) which provides that an employee's right to his accrued benefit derived from employer contributions made to the trust pursuant to his election is nonforfeitable, and
(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of

service with the employer (or employers) maintaining the plan extending beyond the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof).

(3) Application of participation and discrimination standards.--

(A) A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement unless--

(i) those employees eligible to benefit under the arrangement satisfy the provisions of section 410(b)(1), and

(ii) the actual deferral percentage for eligible highly compensated employees (as defined in paragraph (5)) for the plan year bears a relationship to the actual deferral percentage for all other eligible employees for the preceding plan year which meets either of the following tests:

(I) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25.

(II) The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2 percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2.

If 2 or more plans which include cash or deferred arrangements are considered as 1 plan for purposes of section 401(a)(4) or 410(b), the cash or deferred arrangements included in such plans shall be treated as 1 arrangement for purposes of this subparagraph.

If any highly compensated employee is a participant under 2 or more cash or deferred arrangements of the employer, for purposes of determining the deferral percentage with respect to such employee, all such cash or deferred arrangements

shall be treated as 1 cash or deferred arrangement. An arrangement may apply clause (ii) by using the plan year rather than the preceding plan year if the employer so elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) For purposes of subparagraph (A), the actual deferral percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of--

(i) the amount of employer contributions actually paid over to the trust on behalf of each such employee for such plan year, to

(ii) the employee's compensation for such plan year.

(C) A cash or deferred arrangement shall be treated as meeting the requirements of subsection (a)(4) with respect to contributions if the requirements of subparagraph (A)(ii) are met.

(D) For purposes of subparagraph (B), the employer contributions on behalf of any employee--

(i) shall include any employer contributions made pursuant to the employee's election under paragraph (2), and

(ii) under such rules as the Secretary may prescribe, may, at the election of the employer, include--

(I) matching contributions (as defined in 401(m)(4)(A)) which meet the requirements of paragraph (2)(B) and (C), and

(II) qualified nonelective contributions (within the meaning of section 401(m)(4)(C)).

(E) For purposes of this paragraph, in the case of the first plan year of any plan (other than a successor plan), the amount taken into account as the actual deferral percentage of nonhighly compensated employees for the preceding plan year shall be--**(i)** 3 percent, or **(ii)** if the employer makes an election under this subclause, the actual deferral percentage of nonhighly compensated employees determined for such first plan year.

(F) Special rule for early participation.--If an employer

elects to apply section 410(b)(4)(B) in determining whether a cash or deferred arrangement meets the requirements of subparagraph (A)(i), the employer may, in determining whether the arrangement meets the requirements of subparagraph (A)(ii), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

(G) A governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) shall be treated as meeting the requirements of this paragraph.

(4) Other requirements.--

(A) Benefits (other than matching contributions) must not be contingent on election to defer.--A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.

(B) Eligibility of State and local governments and tax-exempt organizations.--

(i) Tax-exempts eligible.--Except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferred arrangement as part of a plan maintained by it.

(ii) Governments ineligible.--A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof. This clause shall not apply to a rural cooperative plan or to a plan of an employer described in clause (iii).

(iii) Treatment of Indian tribal governments.--An employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.

(C) Coordination with other plans.--Except as provided in section 401(m), any employer contribution made pursuant to an employee's election under a qualified cash or deferred arrangement shall not be taken into account for purposes of determining whether any other plan meets the requirements of section 401(a) or 410(b). This subparagraph shall not apply for purposes of determining whether a plan meets the average benefit requirement of section 410(b)(2)(A)(ii).

(5) Highly compensated employee.--For purposes of this subsection, the term "highly compensated employee" has the meaning given such term by section 414(q).

(6) Pre-ERISA money purchase plan.--For purposes of this subsection, the term "pre-ERISA money purchase plan" means a pension plan--**(A)** which is a defined contribution plan (as defined in section 414(i), **(B)** which was in existence on June 27, 1974, and which, on such date, included a salary reduction arrangement, and **(C)** under which neither the employee contributions nor the employer contributions may exceed the levels provided for by the contribution formula in effect under the plan on such date.

(7) Rural cooperative plan.--For purposes of this subsection--

(A) In general.--The term "rural cooperative plan" means any pension plan--**(i)** which is a defined contribution plan (as defined in section 414(i)), and **(ii)** which is established and maintained by a rural cooperative.

(B) Rural cooperative defined.--For purposes of

subparagraph (A), the term "rural cooperative" means--
(i) any organization which--(I) is engaged primarily in providing electric service on a mutual or cooperative basis, or (II) is engaged primarily in providing electric service to the public in its area of service and which is exempt from tax under this subtitle or which is a State or local government (or an agency or instrumentality thereof), other than a municipality (or an agency or instrumentality thereof),
(ii) any organization described in paragraph (4) or (6) of section 501(c) and at least 80 percent of the members of which are organizations described in clause (i),
(iii) a cooperative telephone company described in section 501(c)(12),
(iv) any organization which--
(I) is a mutual irrigation or ditch company described in section 501(c)(12) (without regard to the 85 percent requirement thereof), or (II) is a district organized under the laws of a State as a municipal corporation for the purpose of irrigation, water conservation, or drainage, and
(v) an organization which is a national association of organizations described in clause (i), (ii),, [FN4] (iii), or (iv).
(C) Special rule for certain distributions.--A rural cooperative plan which includes a qualified cash or deferred arrangement shall not be treated as violating the requirements of section 401(a) or of paragraph (2) merely by reason of a hardship distribution or a distribution to a participant after attainment of age 59 1/2 . For purposes of this section, the term "hardship distribution" means a distribution described in paragraph (2)(B)(i)(IV) (without regard to the limitation of its application to profit-sharing or stock bonus plans).
(8) Arrangement not disqualified if excess contributions distributed.--
(A) In general.--A cash or deferred arrangement shall not be treated as failing to meet the requirements of clause (ii) of paragraph (3)(A) for any plan year if, before the close of the following plan year (i) the amount of the excess

contributions for such plan year (and any income allocable to such contributions) is distributed, or **(ii)** to the extent provided in regulations, the employee elects to treat the amount of the excess contributions as an amount distributed to the employee and then contributed by the employee to the plan.

Any distribution of excess contributions (and income) may be made without regard to any other provision of law.

(B) Excess contributions.--For purposes of subparagraph (A), the term "excess contributions" means, with respect to any plan year, the excess of--**(i)** the aggregate amount of employer contributions actually paid over to the trust on behalf of highly compensated employees for such plan year, over **(ii)** the maximum amount of such contributions permitted under the limitations of clause (ii) of paragraph (3)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of the actual deferral percentages beginning with the highest of such percentages).

(C) Method of distributing excess contributions.--Any distribution of the excess contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions by, or on behalf of, each of such employees.

(D) Additional tax under section 72(t) not to apply.--No tax shall be imposed under section 72(t) on any amount required to be distributed under this paragraph.

(E) Treatment of matching contributions forfeited by reason of excess deferral or contribution.--For purposes of paragraph (2)(C), a matching contribution (within the meaning of subsection (m)) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under subparagraph (B), an excess deferral under section 402(g)(2)(A), or an excess aggregate contribution under section 401(m)(6)(B).

(F) Cross reference.--
For excise tax on certain excess contributions, see section 4979.
(9) Compensation.--For purposes of this subsection, the term "compensation" has the meaning given such term by section 414(s).
(10) Distributions upon termination of plan--
(A) In general.--An event described in this subparagraph is the termination of the plan without establishment or maintenance of another defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)).
(B) Distributions must be lump sum distributions.--
(i) In general.--A termination shall not be treated as described in subparagraph (A) with respect to any employee unless the employee receives a lump sum distribution by reason of the termination.
(ii) Lump-sum distribution.--For purposes of this subparagraph, the term "lump-sum distribution" has the meaning given such term by section 402(e)(4)(D) (without regard to subclauses (I), (II), (III), and (IV) of clause (i) thereof). Such term includes a distribution of an annuity contract from--
(I) a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501(a), or
(II) an annuity plan described in section 403(a).
[(C) Repealed. Pub.L. 107-16, Title VI, § 646(a)(1)(C)(ii), June 7, 2001, 115 Stat. 126]
(11) Adoption of simple plan to meet nondiscrimination tests.--
(A) In general.--A cash or deferred arrangement maintained by an eligible employer shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement meets--
(i) the contribution requirements of subparagraph (B),
(ii) the exclusive plan requirements of subparagraph (C), and

(iii) the vesting requirements of section 408(p)(3).

(B) Contribution requirements.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement--

(I) an employee may elect to have the employer make elective contributions for the year on behalf of the employee to a trust under the plan in an amount which is expressed as a percentage of compensation of the employee but which in no event exceeds the amount in effect under section 408(p)(2)(A)(ii),

(II) the employer is required to make a matching contribution to the trust for the year in an amount equal to so much of the amount the employee elects under subclause (I) as does not exceed 3 percent of compensation for the year, and

(III) no other contributions may be made other than contributions described in subclause (I) or (II).

(ii) Employer may elect 2-percent nonelective contribution.--An employer shall be treated as meeting the requirements of clause (i)(II) for any year if, in lieu of the contributions described in such clause, the employer elects (pursuant to the terms of the arrangement) to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least $5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60th day before the beginning of such year.

(iii) Administrative requirements.--

(I) In general.--Rules similar to the rules of subparagraphs (B) and (C) of section 408(p)(5) shall apply for purposes of this subparagraph.

(II) Notice of election period.--The requirements of this subparagraph shall not be treated as met with respect to any year unless the employer notifies each employee eligible to

participate, within a reasonable period of time before the 60th day before the beginning of such year (and, for the first year the employee is so eligible, the 60th day before the first day such employee is so eligible), of the rules similar to the rules of section 408(p)(5)(C) which apply by reason of subclause (I).

(C) Exclusive plan requirement.--The requirements of this subparagraph are met for any year to which this paragraph applies if no contributions were made, or benefits were accrued, for services during such year under any qualified plan of the employer on behalf of any employee eligible to participate in the cash or deferred arrangement, other than contributions described in subparagraph (B).

(D) Definitions and special rule.--

(i) Definitions.--For purposes of this paragraph, any term used in this paragraph which is also used in section 408(p) shall have the meaning given such term by such section.

(ii) Coordination with top-heavy rules.--A plan meeting the requirements of this paragraph for any year shall not be treated as a top-heavy plan under section 416 for such year if such plan allows only contributions required under this paragraph.

[(E) Repealed. Pub.L. 107-16, Title VI, § 611(f)(3)(B), June 7, 2001, 115 Stat. 97]

(12) Alternative methods of meeting nondiscrimination requirements.--

(A) In general.--A cash or deferred arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement--

(i) meets the contribution requirements of subparagraph (B) or (C), and

(ii) meets the notice requirements of subparagraph (D).

(B) Matching contributions.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement, the employer makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to--

(I) 100 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 3 percent of the employee's compensation, and

(II) 50 percent of the elective contributions of the employee to the extent that such elective contributions exceed 3 percent but do not exceed 5 percent of the employee's compensation.

(ii) Rate for highly compensated employees.--The requirements of this subparagraph are not met if, under the arrangement, the rate of matching contribution with respect to any elective contribution of a highly compensated employee at any rate of elective contribution is greater than that with respect to an employee who is not a highly compensated employee.

(iii) Alternative plan designs.--If the rate of any matching contribution with respect to any rate of elective contribution is not equal to the percentage required under clause (i), an arrangement shall not be treated as failing to meet the requirements of clause (i) if--

(I) the rate of an employer's matching contribution does not increase as an employee's rate of elective contributions increase, and

(II) the aggregate amount of matching contributions at such rate of elective contribution is at least equal to the aggregate amount of matching contributions which would be made if matching contributions were made on the basis of the percentages described in clause (i).

(C) Nonelective contributions.--The requirements of this subparagraph are met if, under the arrangement, the employer is required, without regard to whether the employee makes an elective contribution or employee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(D) Notice requirement.--An arrangement meets the

requirements of this paragraph if, under the arrangement, each employee eligible to participate is, within a reasonable period before any year, given written notice of the employee's rights and obligations under the arrangement which--

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

(E) Other requirements.--

(i) Withdrawal and vesting restrictions.--An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) of this paragraph unless the requirements of subparagraphs (B) and (C) of paragraph (2) are met with respect to all employer contributions (including matching contributions) taken into account in determining whether the requirements of subparagraphs (B) and (C) of this paragraph are met.

(ii) Social security and similar contributions not taken into account.--An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) unless such requirements are met without regard to subsection (l), and, for purposes of subsection (l), employer contributions under subparagraph (B) or (C) shall not be taken into account.

(F) Other plans.--An arrangement shall be treated as meeting the requirements under subparagraph (A)(i) if any other plan maintained by the employer meets such requirements with respect to employees eligible under the arrangement.

(a) Individual retirement account. For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16) [26 USCS § 402(c), 403(a)(4), 403(b)(8), or 457(e)(16)], no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)].

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) [26 USCS § 401(a)(9)] and the incidental death benefit requirements of section 401(a) [26 USCS § 401(a)] shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(b) Individual retirement annuity. For purposes of this section, the term "individual retirement annuity" means an

annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract--

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will not exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)], and

(C) any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) [26 USCS § 401(a)(9)] and the incidental death benefit requirements of section 401(a) [26 USCS § 401(a)] shall apply to the distribution of the entire interest of the owner.

(4) The entire interest of the owner is nonforfeitable.

Such term does not include such an annuity contract for any taxable year of the owner in which it is disqualified on the application of subsection (e) or for any subsequent taxable year. For purposes of this subsection, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name such contract is purchased attains age 70 1/2 ; if it is not for the exclusive benefit of the individual in whose name it is purchased or his beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of such individual for any taxable year exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)].

(c) Accounts established by employers and certain associations of employees. A trust created or organized in the United States by an employer for the exclusive benefit of his

employees or their beneficiaries, or by an association of employees (which may include employees within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)]) for the exclusive benefit of its members or their beneficiaries, shall be treated as an individual retirement account (described in subsection (a)), but only if the written governing instrument creating the trust meets the following requirements:

(1) The trust satisfies the requirements of paragraphs (1) through (6) of subsection (a).

(2) There is a separate accounting for the interest of each employee or member (or spouse of an employee or member).

The assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

(d) Tax treatment of distributions.

(1) In general. Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72 [26 USCS § 72].

(2) Special rules for applying section 72. For purposes of applying section 72 [26 USCS § 72] to any amount described in paragraph (1)--

(A) all individual retirement plans shall be treated as 1 contract,

(B) all distributions during any taxable year shall be treated as 1 distribution, and

(C) the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins.

For purposes of subparagraph (C), the value of the contract shall be increased by the amount of any distributions during the calendar year.

(3) Rollover contribution. An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

(A) In general. Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if--

(i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or

(ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).

For purposes of clause (ii), the term "eligible retirement plan" means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) [26 USCS § 402(c)(8)(B)].

(B) Limitation. This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in that subparagraph from an individual retirement account or an individual retirement annuity which was not includible in his gross income because of the application of this paragraph.

(C) Denial of rollover treatment for inherited accounts, etc.(i) In general. In the case of an inherited individual retirement account or individual retirement annuity--
(I) this paragraph shall not apply to any amount received by an individual from such an account or annuity (and no amount transferred from such account or annuity to another

individual retirement account or annuity shall be excluded from gross income by reason of such transfer), and (II) such inherited account or annuity shall not be treated as an individual retirement account or annuity for purposes of determining whether any other amount is a rollover contribution.

(ii) Inherited individual retirement account or annuity. An individual retirement account or individual retirement annuity shall be treated as inherited if--(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, and (II) such individual was not the surviving spouse of such other individual.

(D) Partial rollovers permitted.

(i) In general. If any amount paid or distributed out of an individual retirement account or individual retirement annuity would meet the requirements of subparagraph (A) but for the fact that the entire amount was not paid into an eligible plan as required by clause (i) or (ii) of subparagraph (A), such amount shall be treated as meeting the requirements of subparagraph (A) to the extent it is paid into an eligible plan referred to in such clause not later than the 60th day referred to in such clause.

(ii) Eligible plan. For purposes of clause (i), the term "eligible plan" means any account, annuity, contract, or plan referred to in subparagraph (A).

(E) Denial of rollover treatment for required distributions. This paragraph shall not apply to any amount to the extent such amount is required to be distributed under subsection (a)(6) or (b)(3).

(F) Frozen deposits. For purposes of this paragraph, rules similar to the rules of section 402(c)(7) [26 USCS § 402(c)(7)] (relating to frozen deposits) shall apply.

(G) Simple retirement accounts. In the case of any payment or distribution out of a simple retirement account (as defined in subsection (p)) to which section 72(t)(6) [26 USCS § 72(t)(6)] applies, this paragraph shall not apply unless such

payment or distribution is paid into another simple retirement account.

(H) Application of section 72.

(i) In general. If--

(I) a distribution is made from an individual retirement plan, and

(II) a rollover contribution is made to an eligible retirement plan described in section 402(c)(8)(B)(iii), (iv), (v), or (vi) [26 USCS § 402(c)(8)(B)(iii), (iv), (v), or (vi)] with respect to all or part of such distribution, then, notwithstanding paragraph (2), the rules of clause (ii) shall apply for purposes of applying section 72 [26 USCS § 72].

(ii) Applicable rules. In the case of a distribution described in clause (i)--

(I) section 72 [26 USCS § 72] shall be applied separately to such distribution, (II) notwithstanding the pro rata allocation of income on, and investment in, the contract to distributions under section 72 [26 USCS § 72], the portion of such distribution rolled over to an eligible retirement plan described in clause (i) shall be treated as from income on the contract (to the extent of the aggregate income on the contract from all individual retirement plans of the distributee), and (III) appropriate adjustments shall be made in applying section 72 [26 USCS § 72] to other distributions in such taxable year and subsequent taxable years.

(I) Waiver of 60-day requirement. The Secretary may waive the 60-day requirement under subparagraphs (A) and (D) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.

(4) Contributions returned before due date of return. Paragraph (1) does not apply to the distribution of any contribution paid during a taxable year to an individual retirement account or for an individual retirement annuity if--

(A) such distribution is received on or before the day prescribed by law (including extensions of time) for filing

such individual's return for such taxable year,

(B) no deduction is allowed under section 219 [26 USCS § 219] with respect to such contribution, and

(C) such distribution is accompanied by the amount of net income attributable to such contribution.

In the case of such a distribution, for purposes of section 61 [26 USCS § 61], any net income described in subparagraph (C) shall be deemed to have been earned and receivable in the taxable year in which such contribution is made.

(5) Distributions of excess contributions after due date for taxable year and certain excess rollover contributions.

(A) In general. In the case of any individual, if the aggregate contributions (other than rollover contributions) paid for any taxable year to an individual retirement account or for an individual retirement annuity do not exceed the dollar amount in effect under section 219(b)(1)(A) [26 USCS § 219(b)(1)(A)], paragraph (1) shall not apply to the distribution of any such contribution to the extent that such contribution exceeds the amount allowable as a deduction under section 219 [26 USCS § 219] for the taxable year for which the contribution was paid--

(i) if such distribution is received after the date described in paragraph (4),

(ii) but only to the extent that no deduction has been allowed under section 219 [26 USCS § 219] with respect to such excess contribution.

If employer contributions on behalf of the individual are paid for the taxable year to a simplified employee pension, the dollar limitation of the preceding sentence shall be increased by the lesser of the amount of such contributions or the dollar limitation in effect under section 415(c)(1)(A) [26 USCS § 415(c)(1)(A)] for such taxable year.

(B) Excess rollover contributions attributable to erroneous information. If--

(i) the taxpayer reasonably relies on information supplied pursuant to subtitle F [26 USCS §§ 6001 et seq.] for determining the amount of a rollover contribution, but (ii) the

information was erroneous, subparagraph (A) shall be applied by increasing the dollar limit set forth therein by that portion of the excess contribution which was attributable to such information. For purposes of this paragraph, the amount allowable as a deduction under section 219 [26 USCS § 219] shall be computed without regard to section 219(g) [26 USCS § 219(g)].

(6) Transfer of account incident to divorce. The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) [26 USCS § 71(b)(2)] is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle [26 USCS §§ 1 et seq.], and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle [26 USCS §§ 1 et seq.] is to be treated as maintained for the benefit of such spouse.

(7) Special rules for simplified employee pensions or simple retirement accounts.

(A) Transfer or rollover of contributions prohibited until deferral test met. Notwithstanding any other provision of this subsection or section 72(t) [26 USCS § 72(t)], paragraph (1) and section 72(t)(1) [26 USCS § 72(t)(1)] shall apply to the transfer or distribution from a simplified employee pension of any contribution under a salary reduction arrangement described in subsection (k)(6) (or any income allocable thereto) before a determination as to whether the requirements of subsection (k)(6)(A)(iii) are met with respect to such contribution.

(B) Certain exclusions treated as deductions. For purposes of paragraphs (4) and (5) and section 4973 [26 USCS § 4973], any amount excludable or excluded from gross income under section 402(h) or 402(k) [26 USCS § 402(h) or 402(k)] shall be treated as an amount allowable or

allowed as a deduction under section 219 [26 USCS § 219].

(e) Tax treatment of accounts and annuities.

(1) Exemption from tax. Any individual retirement account is exempt from taxation under this subtitle [26 USCS §§ 1 et seq.] unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 [26 USCS § 511] (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) Loss of exemption of account where employee engages in prohibited transaction.

(A) In general. If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 [26 USCS § 4975] with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year. For purposes of this paragraph--

(i) the individual for whose benefit any account was established is treated as the creator of such account, and

(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) Account treated as distributing all its assets. In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A) as of the first day of any taxable year, paragraph (1) of subsection (d) applies as if there were a distribution on such first day in an amount equal to the fair market value (on such first day) of all assets in the account (on such first day).

(3) Effect of borrowing on annuity contract. If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of such contract, the contract ceases to be an individual retirement annuity as of

the first day of such taxable year. Such owner shall include in gross income for such year an amount equal to the fair market value of such contract as of such first day.

(4) Effect of pledging account as security. If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(5) Purchase of endowment contract by individual retirement account. If the assets of an individual retirement account or any part of such assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established--

(A) to the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subsection (d)(3), and

(B) to the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, such amounts are treated as distributed to that individual (but the provisions of subsection (f) do not apply).

(6) Commingling individual retirement account amounts in certain common trust funds and common investment funds. Any common trust fund or common investment fund of individual retirement account assets which is exempt from taxation under this subtitle [26 USCS §§ 1 et seq.] does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under section 501(a) [26 USCS § 501(a)] which is described in section 401(a) [26 USCS § 401(a)].

(g) Community property laws. This section shall be applied without regard to any community property laws.

(h) Custodial accounts. For purposes of this section, a custodial account shall be treated as a trust if the assets of

such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

(i) Reports. The trustee of an individual retirement account and the issuer of an endowment contract described in subsection (b) or an individual retirement annuity shall make such reports regarding such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions (and the years to which they relate), distributions aggregating $ 10 or more in any calendar year, and such other matters as the Secretary may require. The reports required by this subsection--

(1) shall be filed at such time and in such manner as the Secretary prescribes, and

(2) shall be furnished to individuals--

(A) not later than January 31 of the calendar year following the calendar year to which such reports relate, and

(B) in such manner as the Secretary prescribes.

In the case of a simple retirement account under subsection (p), only one report under this subsection shall be required to be submitted each calendar year to the Secretary (at the time provided under paragraph (2)) but, in addition to the report under this subsection, there shall be furnished, within 31 days after each calendar year, to the individual on whose behalf the account is maintained a statement with respect to the account balance as of the close of, and the account activity during, such calendar year.

(j) Increase in maximum limitations for simplified employee pensions. In the case of any simplified employee pension, subsections (a)(1) and (b)(2) of this section shall be applied by increasing the amounts contained therein by the amount of the limitation in effect under section 415(c)(1)(A) [26 USCS § 415(c)(1)(A)].

(k) Simplified employee pension defined.

(1) In general. For purposes of this title, the term "simplified employee pension" means an individual retirement account or individual retirement annuity--

(A) with respect to which the requirements of paragraphs (2), (3), (4), and (5) of this subsection are met, and

(B) if such account or annuity is part of a top-heavy plan (as defined in section 416 [26 USCS § 416]), with respect to which the requirements of section 416(c)(2) [26 USCS § 416(c)(2)] are met.

(2) Participation requirements. This paragraph is satisfied with respect to a simplified employee pension for a year only if for such year the employer contributes to the simplified employee pension of each employee who--

(A) has attained age 21,

(B) has performed service for the employer during at least 3 of the immediately preceding 5 years, and

(C) received at least $ 450 in compensation (within the meaning of section 414(q)(4) [26 USCS § 414(q)(4)]) from the employer for the year.

For purposes of this paragraph, there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3) [26 USCS § 410(b)(3)]. For purposes of any arrangement described in subsection (k)(6), any employee who is eligible to have employer contributions made on the employee's behalf under such arrangement shall be treated as if such a contribution was made.

(3) Contributions may not discriminate in favor of the highly compensated, etc.

(A) In general. The requirements of this paragraph are met with respect to a simplified employee pension for a year if for such year the contributions made by the employer to simplified employee pensions for his employees do not discriminate in favor of any highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]).

(B) Special rules. For purposes of subparagraph (A), there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3) [26 USCS § 410(b)(3)].

(C) Contributions must bear uniform relationship to total compensation. For purposes of subparagraph (A), and except as provided in subparagraph (D), employer contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)) shall be considered discriminatory unless contributions thereto bear a uniform relationship to the compensation (not in excess of the first $ 200,000) of each employee maintaining a simplified employee pension.

(D) Permitted disparity. For purposes of subparagraph (C), the rules of section 401(1)(2) [26 USCS § 401(1)(2)] shall apply to contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)).

(4) Withdrawals must be permitted. A simplified employee pension meets the requirements of this paragraph only if--

(A) employer contributions thereto are not conditioned on the retention in such pension of any portion of the amount contributed, and

(B) there is no prohibition imposed by the employer on withdrawals from the simplified employee pension.

(5) Contributions must be made under written allocation formula. The requirements of this paragraph are met with respect to a simplified employee pension only if employer contributions to such pension are determined under a definite written allocation formula which specifies--

(A) the requirements which an employee must satisfy to

share in an allocation, and

(B) the manner in which the amount allocated is computed.

(6) Employee may elect salary reduction arrangement.

(A) Arrangements which qualify.

(i) In general. A simplified employee pension shall not fail to meet the requirements of this subsection for a year merely because, under the terms of the pension, an employee may elect to have the employer make payments--

(I) as elective employer contributions to the simplified employee pension on behalf of the employee, or

(II) to the employee directly in cash.

(ii) 50 Percent of eligible employees must elect. Clause (i) shall not apply to a simplified employee pension unless an election described in clause (i)(I) is made or is in effect with respect to not less than 50 percent of the employees of the employer eligible to participate.

(iii) Requirements relating to deferral percentage. Clause (i) shall not apply to a simplified employee pension for any year unless the deferral percentage for such year of each highly compensated employee eligible to participate is not more than the product of--

(I) the average of the deferral percentages for such year of all employees (other than highly compensated employees) eligible to participate, multiplied by

(II) 1.25.

(iv) Limitations on elective deferrals. Clause (i) shall not apply to a simplified employee pension unless the requirements of section 401(a)(30) [26 USCS § 401(a)(30)] are met.

(B) Exception where more than 25 employees. This paragraph shall not apply with respect to any year in the case of a simplified employee pension maintained by an employer with more than 25 employees who were eligible to participate (or would have been required to be eligible to participate if a pension was maintained) at any time during the preceding year.

(C) Distributions of excess contributions.

(i) In general. Rules similar to the rules of section 401(k)(8) [26 USCS § 401(k)(8)] shall apply to any excess contribution under this paragraph. Any excess contribution under a simplified employee pension shall be treated as an excess contribution for purposes of section 4979 [26 USCS § 4979].

(ii) Excess contribution. For purposes of clause (i), the term "excess contribution" means, with respect to a highly compensated employee, the excess of elective employer contributions under this paragraph over the maximum amount of such contributions allowable under subparagraph (A)(iii).

(D) Deferral percentage. For purposes of this paragraph, the deferral percentage for an employee for a year shall be the ratio of--(i) the amount of elective employer contributions actually paid over to the simplified employee pension on behalf of the employee for the year, to (ii) the employee's compensation (not in excess of the first $ 200,000) for the year.

(E) Exception for state and local and tax-exempt pensions. This paragraph shall not apply to a simplified employee pension maintained by--

(i) a State or local government or political subdivision thereof, or any agency or instrumentality thereof, or (ii) an organization exempt from tax under this title.

(F) Exception where pension does not meet requirements necessary to insure distribution of excess contributions. This paragraph shall not apply with respect to any year for which the simplified employee pension does not meet such requirements as the Secretary may prescribe as are necessary to insure that excess contributions are distributed in accordance with subparagraph (C), including--(i) reporting requirements, and (ii) requirements which, notwithstanding paragraph (4), provide that contributions (and any income allocable thereto) may not be withdrawn from a simplified employee pension until a determination has been made that

the requirements of subparagraph (A)(iii) have been met with respect to such contributions.

(G) Highly compensated employee. For purposes of this paragraph, the term "highly compensated employee" has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(H) Termination. This paragraph shall not apply to years beginning after December 31, 1996. The preceding sentence shall not apply to a simplified employee pension of an employer if the terms of simplified employee pensions of such employer, as in effect on December 31, 1996, provide that an employee may make the election described in subparagraph (A).

(7) Definitions. For purposes of this subsection and subsection (1)--

(A) Employee, employer, or owner-employee. The terms "employee", "employer", and "owner-employee" shall have the respective meanings given such terms by section 401(c) [26 USCS § 401(c)].

(B) Compensation. Except as provided in paragraph (2)(C), the term "compensation" has the meaning given such term by section 414(s) [26 USCS § 414(s)].

(C) Year. The term "year" means--

(i) the calendar year, or

(ii) if the employer elects, subject to such terms and conditions as the Secretary may prescribe, to maintain the simplified employee pension on the basis of the employer's taxable year.

(8) Cost-of-living adjustment. The Secretary shall adjust the $ 450 amount in paragraph (2)(C) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)] and shall adjust the $ 200,000 amount in paragraphs (3)(C) and (6)(D)(ii) at the same time, and by the same amount, as any adjustment under section 401(a)(17)(B) [26 USCS § 401(a)(17)(B)]; except that any increase in the $ 450 amount which is not a multiple of $ 50 shall be rounded to the next lowest multiple of $ 50.

(9) Cross reference. For excise tax on certain excess contributions, see section 4979 [26 USCS § 4979].

(l) Simplified employer reports.

(1) In general. An employer who makes a contribution on behalf of an employee to a simplified employee pension shall provide such simplified reports with respect to such contributions as the Secretary may require by regulations. The reports required by this subsection shall be filed at such time and in such manner, and information with respect to such contributions shall be furnished to the employee at such time and in such manner, as may be required by regulations.

(2) Simple retirement accounts.

(A) No employer reports. Except as provided in this paragraph, no report shall be required under this section by an employer maintaining a qualified salary reduction arrangement under subsection (p).

(B) Summary description. The trustee of any simple retirement account established pursuant to a qualified salary reduction arrangement under subsection (p) and the issuer of an annuity established under such an arrangement shall provide to the employer maintaining the arrangement, each year a description containing the following information:

(i) The name and address of the employer and the trustee or issuer.

(ii) The requirements for eligibility for participation.

(iii) The benefits provided with respect to the arrangement.

(iv) The time and method of making elections with respect to the arrangement.

(v) The procedures for, and effects of, withdrawals (including rollovers) from the arrangement.

(C) Employee notification. The employer shall notify each employee immediately before the period for which an election described in subsection (p)(5)(C) may be made of the employee's opportunity to make such election. Such notice shall include a copy of the description described in

subparagraph (B).

(m) Investment in collectibles treated as distributions.

(1) In general. The acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) of any collectible shall be treated (for purposes of this section and section 402) as a distribution from such account in an amount equal to the cost to such account of such collectible.

(2) Collectible defined. For purposes of this subsection, the term "collectible" means--

(A) any work of art,

(B) any rug or antique,

(C) any metal or gem,

(D) any stamp or coin,

(E) any alcoholic beverage, or

(F) any other tangible personal property specified by the Secretary for purposes of this subsection.

(3) Exception for certain coins and bullion. For purposes of this subsection, the term "collectible" shall not include--

(A) any coin which is--

(i) a gold coin described in paragraph (7), (8), (9), or (10) of section 5112(a) of title 31, United States Code, (ii) a silver coin described in section 5112(e) of title 31, United States Code, (iii) a platinum coin described in section 5112(k) of title 31, United States Code, or (iv) a coin issued under the laws of any State, or

(B) any gold, silver, platinum, or palladium bullion of a fineness equal to or exceeding the minimum fineness that a contract market (as described in section 7 of the Commodity Exchange Act, 7 U.S.C. 7) requires for metals which may be delivered in satisfaction of a regulated futures contract,

if such bullion is in the physical possession of a trustee described under subsection (a) of this section.

(n) Bank. For purposes of subsection (a)(2), the term "bank" means--

(1) any bank (as defined in section 581 [26 USCS § 581]),

(2) an insured credit union (within the meaning of paragraph (6) or (7) of section 101 of the Federal Credit Union Act [12 USCS § 1752]), and

(3) a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

(o) Definitions and rules relating to nondeductible contributions to individual retirement plans.

(1) In general. Subject to the provisions of this subsection, designated nondeductible contributions may be made on behalf of an individual to an individual retirement plan.

(2) Limits on amounts which may be contributed.

(A) In general. The amount of the designated nondeductible contributions made on behalf of any individual for any taxable year shall not exceed the nondeductible limit for such taxable year.

(B) Nondeductible limit. For purposes of this paragraph--

(i) In general. The term "nondeductible limit" means the excess of--(I) the amount allowable as a deduction under section 219 [26 USCS § 219] (determined without regard to section 219(g) [26 USCS § 219(g)]), over (II) the amount allowable as a deduction under section 219 [26 USCS § 219] (determined with regard to section 219(g) [26 USCS § 219(g)]).

(ii) Taxpayer may elect to treat deductible contributions as nondeductible. If a taxpayer elects not to deduct an amount which (without regard to this clause) is allowable as a deduction under section 219 [26 USCS § 219] for any taxable year, the nondeductible limit for such taxable year shall be increased by such amount.

(C) Designated nondeductible contributions.

(i) In general. For purposes of this paragraph, the term "designated nondeductible contribution" means any

contribution to an individual retirement plan for the taxable year which is designated (in such manner as the Secretary may prescribe) as a contribution for which a deduction is not allowable under section 219 [26 USCS § 219].

(ii) Designation. Any designation under clause (i) shall be made on the return of tax imposed by chapter 1 for the taxable year.

(3) Time when contributions made. In determining for which taxable year a designated nondeductible contribution is made, the rule of section 219(f)(3) shall apply.

(4) Individual required to report amount of designated nondeductible contributions.

(A) In general. Any individual who--

(i) makes a designated nondeductible contribution to any individual retirement plan for any taxable year, or (ii) receives any amount from any individual retirement plan for any taxable year, shall include on his return of the tax imposed by chapter 1 [26 USCS §§ 1 et seq.] for such taxable year and any succeeding taxable year (or on such other form as the Secretary may prescribe for any such taxable year) information described in subparagraph (B).

(B) Information required to be supplied. The following information is described in this subparagraph:

(i) The amount of designated nondeductible contributions for the taxable year, (ii) The amount of distributions from individual retirement plans for the taxable year.(iii) The excess (if any) of--(I) the aggregate amount of designated nondeductible contributions for all preceding taxable years, over (II) the aggregate amount of distributions from individual retirement plans which was excludable from gross income for such taxable years.

(iv) The aggregate balance of all individual retirement plans of the individual as of the close of the calendar year in which the taxable year begins. (v) Such other information as the Secretary may prescribe.

(C) Penalty for reporting contributions not made.

For penalty where individual reports designated

nondeductible contributions not made, see section 6693(b)
(p) Simple retirement accounts.

(1) In general. For purposes of this title, the term "simple retirement account" means an individual retirement plan (as defined in section 7701(a)(37) [26 USCS § 7701(a)(37)])--

(A) with respect to which the requirements of paragraphs (3), (4), and (5) are met; and (B) with respect to which the only contributions allowed are contributions under a qualified salary reduction arrangement.

(2) Qualified salary reduction arrangement.

(A) In general. For purposes of this subsection, the term "qualified salary reduction arrangement" means a written arrangement of an eligible employer under which-- (i) an employee eligible to participate in the arrangement may elect to have the employer make payments--

(I) as elective employer contributions to a simple retirement account on behalf of the employee, or

(II) to the employee directly in cash,

(ii) the amount which an employee may elect under clause (i) for any year is required to be expressed as a percentage of compensation and may not exceed a total of the applicable dollar amount for any year,(iii) the employer is required to make a matching contribution to the simple retirement account for any year in an amount equal to so much of the amount the employee elects under clause (i)(I) as does not exceed the applicable percentage of compensation for the year, and (iv) no contributions may be made other than contributions described in clause (i) or (iii).

(B) Employer may elect 2-percent nonelective contribution.

(i) In general. An employer shall be treated as meeting the requirements of subparagraph (A)(iii) for any year if, in lieu of the contributions described in such clause, the employer elects to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least $ 5,000 of compensation from the employer for the year. If an employer

makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60-day period for such year under paragraph (5)(C). (ii) Compensation limitation. The compensation taken into account under clause (i) for any year shall not exceed the limitation in effect for such year under section 401(a)(17) [26 USCS § 401(a)(17)].

(C) Definitions. For purposes of this subsection--

(i) Eligible employer.

(I) In general. The term "eligible employer" means, with respect to any year, an employer which had no more than 100 employees who received at least $ 5,000 of compensation from the employer for the preceding year.

(II) 2-year grace period. An eligible employer who establishes and maintains a plan under this subsection for 1 or more years and who fails to be an eligible employer for any subsequent year shall be treated as an eligible employer for the 2 years following the last year the employer was an eligible employer. If such failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence shall not apply.

(ii) Applicable percentage.

(I) In general. The term "applicable percentage" means 3 percent.

(II) Election of lower percentage. An employer may elect to apply a lower percentage (not less than 1 percent) for any year for all employees eligible to participate in the plan for such year if the employer notifies the employees of such lower percentage within a reasonable period of time before the 60-day election period for such year under paragraph (5)(C). An employer may not elect a lower percentage under this subclause for any year if that election would result in the applicable percentage being lower than 3 percent in more than 2 of the years in the 5-year period ending with such year.

(III) Special rule for years arrangement not in effect. If any year in the 5-year period described in subclause (II) is

a year prior to the first year for which any qualified salary reduction arrangement is in effect with respect to the employer (or any predecessor), the employer shall be treated as if the level of the employer matching contribution was at 3 percent of compensation for such prior year.

(D) Arrangement may be only plan of employer.

(i) In general. An arrangement shall not be treated as a qualified salary reduction arrangement for any year if the employer (or any predecessor employer) maintained a qualified plan with respect to which contributions were made, or benefits were accrued, for service in any year in the period beginning with the year such arrangement became effective and ending with the year for which the determination is being made. If only individuals other than employees described in subparagraph (A) of section 410(b)(3) [26 USCS § 410(b)(3)] are eligible to participate in such arrangement, then the preceding sentence shall be applied without regard to any qualified plan in which only employees so described are eligible to participate. (ii) Qualified plan. For purposes of this subparagraph, the term "qualified plan" means a plan, contract, pension, or trust described in subparagraph (A) or (B) of section 219(g)(5) [26 USCS § 219(g)(5)].

(E) Applicable dollar amount; cost-of-living adjustment.

(i) In general. For purposes of subparagraph (A)(ii), the applicable dollar amount shall be the amount determined in accordance with the following table:

For years beginning in calendar year:	the applicable dollar amount:
2002	$ 7,000
2003	$ 8,000
2004	$ 9,000
2005 or thereafter	$ 10,000.

(ii) Cost-of-living adjustment. In the case of a year beginning after December 31, 2005, the Secretary shall adjust

the $ 10,000 amount under clause (i) at the same time and in the same manner as under section 415(d) [26 USCS § 415(d)], except that the base period taken into account shall be the calendar quarter beginning July 1, 2004, and any increase under this subparagraph which is not a multiple of $ 500 shall be rounded to the next lower multiple of $ 500.

(3) Vesting requirements. The requirements of this paragraph are met with respect to a simple retirement account if the employee's rights to any contribution to the simple retirement account are nonforfeitable. For purposes of this paragraph, rules similar to the rules of subsection (k)(4) shall apply.

(4) Participation requirements.

(A) In general. The requirements of this paragraph are met with respect to any simple retirement account for a year only if, under the qualified salary reduction arrangement, all employees of the employer who--(i) received at least $ 5,000 in compensation from the employer during any 2 preceding years, and (ii) are reasonably expected to receive at least $ 5,000 in compensation during the year, are eligible to make the election under paragraph (2)(A)(i) or receive the nonelective contribution described in paragraph (2)(B).

(B) Excludable employees. An employer may elect to exclude from the requirement under subparagraph (A) employees described in section 410(b)(3) [26 USCS § 410(b)(3)].

(5) Administrative requirements. The requirements of this paragraph are met with respect to any simple retirement account if, under the qualified salary reduction arrangement--

(A) an employer must--(i) make the elective employer contributions under paragraph (2)(A)(i) not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made, and (ii) make the matching contributions under paragraph (2)(A)(iii) or the nonelective contributions under paragraph (2)(B) not later than the date described in section 404(m)(2)(B) [26 USCS § 404(m)(2)(B)],

(B) an employee may elect to terminate participation in such arrangement at any time during the year, except that if an employee so terminates, the arrangement may provide that the employee may not elect to resume participation until the beginning of the next year, and

(C) each employee eligible to participate may elect, during the 60-day period before the beginning of any year (and the 60-day period before the first day such employee is eligible to participate), to participate in the arrangement, or to modify the amounts subject to such arrangement, for such year.

(6) Definitions. For purposes of this subsection--

(A) Compensation.

(i) In general. The term "compensation" means amounts described in paragraphs (3) and (8) of section 6051(a) [26 USCS § 6051(a)]. For purposes of the preceding sentence, amounts described in section 6051(a)(3) [26 USCS § 6051(a)(3)] shall be determined without regard to section 3401(a)(3) [26 USCS § 3401(a)(3)].

(ii) Self-employed. In the case of an employee described in subparagraph (B), the term "compensation" means net earnings from self-employment determined under section 1402(a) [26 USCS § 1402(a)] without regard to any contribution under this subsection. The preceding sentence shall be applied as if the term "trade or business" for purposes of section 1402 [26 USCS § 1402] included service described in section 1402(c)(6) [26 USCS § 1402(c)(6)].

(B) Employee. The term "employee" includes an employee as defined in section 401(c)(1) [26 USCS § 401(c)(1)].

(C) Year. The term "year" means the calendar year.

(7) Use of designated financial institution. A plan shall not be treated as failing to satisfy the requirements of this subsection or any other provision of this title merely because the employer makes all contributions to the individual retirement accounts or annuities of a designated trustee or issuer. The preceding sentence shall not apply unless each

plan participant is notified in writing (either separately or as part of the notice under subsection (l)(2)(C)) that the participant's balance may be transferred without cost or penalty to another individual account or annuity in accordance with subsection (d)(3)(G).

(8) Coordination with maximum limitation under subsection (a). In the case of any simple retirement account, subsections (a)(1) and (b)(2) shall be applied by substituting "the sum of the dollar amount in effect under paragraph (2)(A)(ii) of this subsection and the employer contribution required under subparagraph (A)(iii) or (B)(i) of paragraph (2) of this subsection, whichever is applicable" for "the dollar amount in effect under section 219(b)(1)(A)".

(9) Matching contributions on behalf of self-employed individuals not treated as elective employer contributions. Any matching contribution described in paragraph (2)(A)(iii) which is made on behalf of a self-employed individual (as defined in section 401(c) [26 USCS § 401(c)]) shall not be treated as an elective employer contribution to a simple retirement account for purposes of this title.

(10) Special rules for acquisitions, dispositions, and similar transactions.

(A) In general. An employer which fails to meet any applicable requirement by reason of an acquisition, disposition, or similar transaction shall not be treated as failing to meet such requirement during the transition period if--(i) the employer satisfies requirements similar to the requirements of section 410(b)(6)(C)(i)(II) [26 USCS § 410(b)(6)(C)(i)(II)]; and (ii) the qualified salary reduction arrangement maintained by the employer would satisfy the requirements of this subsection after the transaction if the employer which maintained the arrangement before the transaction had remained a separate employer.

(B) Applicable requirement. For purposes of this paragraph, the term "applicable requirement" means--(i) the requirement under paragraph (2)(A)(i) that an employer be an eligible employer; (ii) the requirement under paragraph

(2)(D) that an arrangement be the only plan of an employer; and (iii) the participation requirements under paragraph (4).

(C) Transition period. For purposes of this paragraph, the term "transition period" means the period beginning on the date of any transaction described in subparagraph (A) and ending on the last day of the second calendar year following the calendar year in which such transaction occurs.

(q) Deemed IRAs under qualified employer plans.

(1) General rule. If--

(A) a qualified employer plan elects to allow employees to make voluntary employee contributions to a separate account or annuity established under the plan, and

(B) under the terms of the qualified employer plan, such account or annuity meets the applicable requirements of this section or section 408A [26 USCS § 408A] for an individual retirement account or annuity,

then such account or annuity shall be treated for purposes of this title in the same manner as an individual retirement plan and not as a qualified employer plan (and contributions to such account or annuity as contributions to an individual retirement plan and not to the qualified employer plan). For purposes of subparagraph (B), the requirements of subsection (a)(5) shall not apply.

(2) Special rules for qualified employer plans. For purposes of this title, a qualified employer plan shall not fail to meet any requirement of this title solely by reason of establishing and maintaining a program described in paragraph (1).

(3) Definitions. For purposes of this subsection--

(A) Qualified employer plan. The term "qualified employer plan" has the meaning given such term by section 72(p)(4)(A)(i) [26 USCS § 72(p)(4)(A)(i)]; except that such term shall also include an eligible deferred compensation plan (as defined in section 457(b) [26 USCS § 457(b)]) of an eligible employer described in section 457(e)(1)(A) [26 USCS § 457(e)(1)(A)].

(B) Voluntary employee contribution. The term

"voluntary employee contribution" means any contribution (other than a mandatory contribution within the meaning of section 411(c)(2)(C) [26 USCS § 411(c)(2)(C)])--(i) which is made by an individual as an employee under a qualified employer plan which allows employees to elect to make contributions described in paragraph (1), and (ii) with respect to which the individual has designated the contribution as a contribution to which this subsection applies.

(r) Cross references.

(1) For tax on excess contributions in individual retirement accounts or annuities, see section 4973 [26 USCS § 4973].

(2) For tax on certain accumulations in individual retirement accounts or annuities, see section 4974 [26 USCS § 4974].

Supreme Court, U.S.
FILED
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(5)

APPENDIX III
STATUTES Vol. II

No. _____

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI, *Pro Se,*
Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.*,
Respondent/self-employed plan participant and trustee,
Law firm employer- plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

Mary Ellen Chajkowski, *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

APPENDIX III

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26 USCS § 410 (2005)

§ 410. Minimum participation standards.

(a) Participation.

(1) Minimum age and service conditions.

(A) General rule. A trust shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] if the plan of which it is a part requires, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates--

(i) the date on which the employee attains the age of 21; or (ii) the date on which he completes 1 year of service.

(B) Special rules for certain plans.

(i) In the case of any plan which provides that after not more than 2 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable (within the meaning of section 411 [26 USCS § 411]) at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting '2 years of service' for '1 year of service'. (ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)]) by an employer which is exempt from tax under section 501(a) [26 USCS § 501(a)] which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable (within the meaning of section 411 [26 USCS § 411]) at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting '26' for '21'. This clause shall not apply to any plan to which clause (i) applies.

(2) Maximum age conditions. A trust shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] if the plan of which it is a part excludes from participation (on the basis of age) employees who have attained a specified age.

(3) Definition of year of service.

(A) General rule. For purposes of this subsection, the term 'year of service' means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, under regulations prescribed by the Secretary of Labor, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(B) Seasonal industries. In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term 'year of service' shall be such period as may be determined under regulations prescribed by the Secretary of Labor.

(C) Hours of service. For purposes of this subsection, the term 'hour of service' means a time of service determined under regulations prescribed by the Secretary of Labor.

(D) Maritime industries. For purposes of this subsection, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary of Labor may prescribe regulations to carry out this subparagraph.

(4) Time of participation. A plan shall be treated as not meeting the requirements of paragraph (1) unless it provides that any employee who has satisfied the minimum age and service requirements specified in such paragraph, and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of--

(A) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or

(B) the date 6 months after the date on which he satisfied such requirements,

unless such employee was separated from the service before the date referred to in subparagraph (A) or (B),

whichever is applicable.

(5) Breaks in service.

(A) General rule. Except as otherwise provided in subparagraphs (B), (C), and (D), all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service for purposes of paragraph (1).

(B) Employees under 2-year 100 percent vesting. In the case of any employee who has any 1-year break in service (as defined in section 411(a)(6)(A) [26 USCS § 411(a)(6)(A)]) under a plan to which the service requirements of clause (i) of paragraph (1)(B) apply, if such employee has not satisfied such requirements, service before such break shall not be required to be taken into account.

(C) 1-year break in service. In computing an employee's period of service for purposes of paragraph (1) in the case of any participant who has any 1-year break in service (as defined in section 411(a)(6)(A) [26 USCS § 411(a)(6)(A)]), service before such break shall not be required to be taken into account under the plan until he has completed a year of service (as defined in paragraph (3)) after his return.

(D) Nonvested participants.

(i) In general. For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account in computing the period of service if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of--

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) Years of service not taken into account. If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in

service.

(iii) Nonvested participant defined. For purposes of clause (i), the term 'nonvested participant' means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E) Special rule for maternity or paternity absences.--

(i) General rule. In the case of each individual who is absent from work for any period--

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service (as defined in section 411(a)(6)(A) [26 USCS § 411(a)(6)(A)]) has occurred, the hours described in clause (ii).

(ii) Hours treated as hours of service. The hours described in this clause are--

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of such absence,

except that the total number of hours treated as hours of service under this clause by reason of any such pregnancy or placement shall not exceed 501 hours.

(iii) Year to which hours are credited. The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph--

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period

of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) Year defined. For purposes of this subparagraph, the term 'year' means the period used in computations pursuant to paragraph (3).

(v) Information required to be filed. A plan shall not fail to satisfy the requirements of this subparagraph solely because it provides that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish--

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(b) Minimum coverage requirements.

(1) In general. A trust shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] unless such trust is designated by the employer as part of a plan which meets 1 of the following requirements:

(A) The plan benefits at least 70 percent of employees who are not highly compensated employees.

(B) The plan benefits--

(i) a percentage of employees who are not highly compensated employees which is at least 70 percent of

(ii) the percentage of highly compensated employees benefiting under the plan.

(C) The plan meets the requirements of paragraph (2).

(2) Average benefit percentage test.

(A) In general. A plan shall be treated as meeting the requirements of this paragraph if--

(i) the plan benefits such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of highly

compensated employees, and

(ii) the average benefit percentage for employees who are not highly compensated employees is at least 70 percent of the average benefit percentage for highly compensated employees.

(B) Average benefit percentage. For purposes of this paragraph, the term 'average benefit percentage' means, with respect to any group, the average of the benefit percentages calculated separately with respect to each employee in such group (whether or not a participant in any plan).

(C) Benefit percentage. For purposes of this paragraph--

(i) In general. The term 'benefit percentage' means the employer-provided contribution or benefit of an employee under all qualified plans maintained by the employer, expressed as a percentage of such employee's compensation (within the meaning of section 414(s) [26 USCS § 414(s)]).

(ii) Period for computing percentage. At the election of an employer, the benefit percentage for any plan year shall be computed on the basis of contributions or benefits for--

(I) such plan year, or

(II) any consecutive plan year period (not greater than 3 years) which ends with such plan year and which is specified in such election.

An election under this clause, once made, may be revoked or modified only with the consent of the Secretary.

(D) Employees taken into account. For purposes of determining who is an employee for purposes of determining the average benefit percentage under subparagraph (B)--

(i) except as provided in clause (ii), paragraph (4)(A) shall not apply, or

(ii) if the employer elects, paragraph (4)(A) shall be applied by using the lowest age and service requirements of all qualified plans maintained by the employer.

(E) Qualified plan. For purposes of this paragraph, the term 'qualified plan' means any plan which (without regard to this subsection) meets the requirements of section 401(a) [26 USCS § 401(a)].

(3) Exclusion of certain employees. For purposes of this subsection, there shall be excluded from consideration--

(A) employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers,

(B) in the case of a trust established or maintained pursuant to an agreement which the Secretary of Labor finds to be a collective bargaining agreement between air pilots represented in accordance with title II of the Railway Labor Act and one or more employers, all employees not covered by such agreement, and

(C) employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2) [26 USCS § 911(d)(2)]) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) [26 USCS § 861(a)(3)]).

Subparagraph (A) shall not apply with respect to coverage of employees under a plan pursuant to an agreement under such subparagraph. Subparagraph (B) shall not apply in the case of a plan which provides contributions or benefits for employees whose principal duties are not customarily performed aboard aircraft in flight.

(4) Exclusion of employees not meeting age and service requirements.

(A) In general. If a plan--

(i) prescribes minimum age and service requirements as a condition of participation, and

(ii) excludes all employees not meeting such requirements from participation,

then such employees shall be excluded from consideration for purposes of this subsection.

(B) Requirements may be met separately with respect to

excluded group. If employees not meeting the minimum age or service requirements of subsection (a)(1) (without regard to subparagraph (B) thereof) are covered under a plan of the employer which meets the requirements of paragraph (1) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets the requirements of paragraph (1).

(C) Requirements not treated as being met before entry date. An employee shall not be treated as meeting the age and service requirements described in this paragraph until the first date on which, under the plan, any employee with the same age and service would be eligible to commence participation in the plan.

(5) Line of business exception.

(A) In general. If, under section 414(r) [26 USCS § 414(r)], an employer is treated as operating separate lines of business for a year, the employer may apply the requirements of this subsection for such year separately with respect to employees in each separate line of business.

(B) Plan must be nondiscriminatory. Subparagraph (A) shall not apply with respect to any plan maintained by an employer unless such plan benefits such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of highly compensated employees.

(6) Definitions and special rules. For purposes of this subsection--

(A) Highly compensated employee. The term 'highly compensated employee' has the meaning given such term by section 414(q) [26 USCS § 414(q)].

(B) Aggregation rules. An employer may elect to designate--

(i) 2 or more trusts,

(ii) 1 or more trusts and 1 or more annuity plans, or

(iii) 2 or more annuity plans,

as part of 1 plan intended to qualify under section 401(a)

[26 USCS § 401(a)] to determine whether the requirements of this subsection are met with respect to such trusts or annuity plans. If an employer elects to treat any trusts or annuity plans as 1 plan under this subparagraph, such trusts or annuity plans shall be treated as 1 plan for purposes of section 401(a)(4) [26 USCS § 401(a)(4)].

(C) Special rules for certain dispositions or acquisitions.

(i) In general. If a person becomes, or ceases to be, a member of a group described in subsection (b), (c), (m), or (o) of section 414 [26 USCS § 414], then the requirements of this subsection shall be treated as having been met during the transition period with respect to any plan covering employees of such person or any other member of such group if--

(I) such requirements were met immediately before each such change, and

(II) the coverage under such plan is not significantly changed during the transition period (other than by reason of the change in members of a group) or such plan meets such other requirements as the Secretary may prescribe by regulation.

(ii) Transition period. For purposes of clause (i), the term 'transition period' means the period--

(I) beginning on the date of the change in members of a group, and

(II) ending on the last day of the 1st plan year beginning after the date of such change.

(D) Special rule for certain employee stock ownership plans. A trust which is part of a tax credit employee stock ownership plan which is the only plan of an employer intended to qualify under section 401(a) [26 USCS § 401(a)] shall not be treated as not a qualified trust under section 401(a) [26 USCS § 401(a)] solely because it fails to meet the requirements of this subsection if--

(i) such plan benefits 50 percent or more of all the employees who are eligible under a nondiscriminatory classification under the plan, and

(ii) the sum of the amounts allocated to each

participant's account for the year does not exceed 2 percent of the compensation of that participant for the year.

(E) Eligibility to contribute. In the case of contributions which are subject to section 401(k) or 401(m) [26 USCS § 401(k) or 401(m)], employees who are eligible to contribute (or elect to have contributions made on their behalf) shall be treated as benefiting under the plan (other than for purposes of paragraph (2)(A)(ii)).

(F) Employers with only highly compensated employees. A plan maintained by an employer which has no employees other than highly compensated employees for any year shall be treated as meeting the requirements of this subsection for such year.

(G) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Application of participation standards to certain plans.

(1) The provisions of this section (other than paragraph (2) of this subsection) shall not apply to--

(A) a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]),

(B) a church plan (within the meaning of section 414(e) [26 USCS § 414(e)]) with respect to which the election provided by subsection (d) of this section has not been made,

(C) a plan which has not at any time after September 2, 1974, provided for employer contributions, and

(D) a plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) [26 USCS § 501(c)(8) or (9)] if no part of the contributions to or under such plan are made by employers of participants in such plan.

(2) A plan described in paragraph (1) shall be treated as meeting the requirements of this section for purposes of section 401(a) [26 USCS § 401(a)], except that in the case of a plan described in subparagraph (B), (C), or (D) of paragraph (1), this paragraph shall apply only if such plan meets the requirements of section 401(a)(3) [26 USCS §

401(a)(3)] (as in effect on September 1, 1974).

(d) Election by church to have participation, vesting, funding, etc., provisions apply.

(1) In general. If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe), then the provisions of this title relating to participation, vesting, funding, etc. (as in effect from time to time) shall apply to such church plan as if such provisions did not contain an exclusion for church plans.

(2) Election irrevocable. An election under this subsection with respect to any church plan shall be binding with respect to such plan, and, once made, shall be irrevocable.

26 USCS § 411 (2005)

§ 411. Minimum vesting standards.

(a) General rule. A trust shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age (as defined in paragraph (8)) and in addition satisfies the requirements of paragraphs (1), (2), and (11) of this subsection and the requirements of subsection (b)(3), and also satisfies, in the case of a defined benefit plan, the requirements of subsection (b)(1) and, in the case of a defined contribution plan, the requirements of subsection (b)(2).

(1) Employee contributions. Except as provided in paragraph (12), a plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) Employer contributions. A plan satisfies the requirements of this paragraph if it satisfies the requirements

of subparagraph (A) or (B).

(A) 5-year vesting. A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) 3 to 7 year vesting. A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

(C) [Deleted]

(3) Certain permitted forfeitures, suspensions, etc. For purposes of this subsection--

(A) Forfeiture on account of death. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 401(a)(11) [26 USCS § 401(a)(11)]).

(B) Suspension of benefits upon reemployment of retiree. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such

benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) Effect of retroactive plan amendments. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 412(c)(8) [26 USCS § 412(c)(8)].

(D) Withdrawal of mandatory contribution.

(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in subsection (c)(2)(C)) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of subsection (c)(2)(C) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service,before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of

the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions (as defined in subsection (c)(2)(C)) made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of employee contributions on a plan year by plan year basis in succeeding order of time.

(v) For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 401(a)(19) [26 USCS § 401(a)(19)].

(E) Cessation of contributions under a multiemployer plan. A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(F) Reduction and suspension of benefits by a multiemployer plan. A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because--

(i) the plan is amended to reduce benefits under section 418D [26 USCS § 418D] or under section 4281 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1441], or

(ii) benefit payments under the plan may be suspended under section 418E [26 USCS § 418E] or under section 4281 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1441].

(G) Treatment of matching contributions forfeited by reason of excess deferral or contribution. A matching contribution (within the meaning of section 401(m) [26 USCS § 401(m)]) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) [26 USCS § 401(k)(8)(B)], an excess deferral under section 402(g)(2)(A) [26 USCS § 402(g)(2)(A)], or an excess aggregate contribution under section 401(m)(6)(B) [26 USCS § 401(m)(6)(B)].

(4) Service included in determination of nonforfeitable percentage. In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under paragraph (2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18,

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan (as defined under regulations prescribed by the Secretary);

(D) service not required to be taken into account under paragraph (6);

(E) years of service before January 1, 1971, unless the

employee has had at least 3 years of service after December 31, 1970;

(F) years of service before the first plan year to which this section applies, if such service would have been disregarded under the rules of the plan with regard to breaks in service as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service--

(i) with an employer after--

(I) a complete withdrawal of that employer from the plan (within the meaning of section 4203 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1383]), or

(II) to the extent permitted in regulations prescribed by the Secretary, a partial withdrawal described in section 4205(b)(2)(A)(i) of such Act [29 USCS § 1385(b)(2)(A)(i)] in conjunction with the decertification of the collective bargaining representative, and

(ii) with any employer under the plan after the termination date of the plan under section 4048 of such Act [29 USCS § 1348].

(5) Year of service.

(A) General rule. For purposes of this subsection, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary of Labor) during which the participant has completed 1,000 hours of service.

(B) Hours of service. For purposes of this subsection, the term "hours of service" has the meaning provided by section 410(a)(3)(C) [26 USCS § 410(a)(3)(C)].

(C) Seasonal industries. In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as may be determined under regulations prescribed by the Secretary of Labor.

(D) Maritime industries. For purposes of this subsection,

in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary of Labor may prescribe regulations to carry out the purposes of this subparagraph.

(6) Breaks in service.

(A) Definition of 1-year break in service. For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary of Labor) during which the participant has not completed more than 500 hours of service.

(B) 1 year of service after 1-year break in service. For purposes of paragraph (4), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) 5 consecutive 1-year breaks in service under defined contribution plan. For purposes of paragraph (4), in the case of any participant in a defined contribution plan, or an insured defined benefit plan which satisfies the requirements of subsection (b)(1)(F), who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such 5-year period.

(D) Nonvested participants.

(i) In general. For purposes of paragraph (4), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of--

(I) 5, or

(II) the aggregate number of years of service before

such period.

(ii) Years of service not taken into account. If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) Nonvested participant defined. For purposes of clause (i), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E) Special rule for maternity or paternity absences.

(i) General rule. In the case of each individual who is absent from work for any period--

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) Hours treated as hours of service. The hours described in this clause are--

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of any such pregnancy or placement shall not exceed 501 hours.

(iii) Year to which hours are credited. The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph--

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) Year defined. For purposes of this subparagraph, the term "year" means the period used in computations pursuant to paragraph (5).

(v) Information required to be filed. A plan shall not fail to satisfy the requirements of this subparagraph solely because it provides that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish--

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(7) Accrued benefit.

(A) In general. For purposes of this section, the term "accrued benefit" means--

(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(ii) in the case of a plan which is not a defined benefit plan, the balance of the employee's account.

(B) Effect of certain distributions. Notwithstanding paragraph (4), for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received--

(i) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than the dollar limit under section 411(a)(11)(A) [26 USCS § 411(a)(11)(A)]) permitted under regulations prescribed by the Secretary, or

(ii) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Clause (i) of this subparagraph shall apply only if such distribution was made on termination of the employee's participation in the plan. Clause (ii) of this subparagraph shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary.

(C) Repayment of subparagraph (B) distributions. For purposes of determining the employee's accrued benefit under a plan, the plan may not disregard service as provided in subparagraph (B) unless the plan provides an opportunity for the participant to repay the full amount of the distribution described in such subparagraph (B) with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subparagraph shall apply only in the case of a participant who--

(i) received such a distribution in any plan year to which this section applies, which distribution was less than the present value of his accrued benefit,

(ii) resumes employment covered under the plan, and

(iii) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C).

The plan provision required under this subparagraph may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the

earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(D) Accrued benefit attributable to employee contributions. The accrued benefit of an employee shall not be less than the amount determined under subsection (c)(2)(B) with respect to the employee's accumulated contributions.

(8) Normal retirement age. For purposes of this section, the term "normal retirement age" means the earlier of--

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of--

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(9) Normal retirement benefit. For purposes of this section, the term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to--

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefits commencing before benefits payable under title II of the Social Security Act [42 USCS §§ 401 et seq.] become payable which--

(i) do not exceed such social security benefits, and

(ii) terminate when such social security benefits

commence.

(10) Changes in vesting schedule.

(A) General rule. A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of paragraph (2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) Election of former schedule. A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of paragraph (2) unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after the adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(11) Restrictions on certain mandatory distributions.

(A) In general. If the present value of any nonforfeitable accrued benefit exceeds $ 5,000, a plan meets the requirements of this paragraph only if such plan provides that such benefit may not be immediately distributed without the consent of the participant.

(B) Determination of present value. For purposes of subparagraph (A), the present value shall be calculated in accordance with section 417(e)(3) [26 USCS § 417(e)(3)].

(C) Dividend distributions of ESOPs arrangement. This paragraph shall not apply to any distribution of dividends to which section 404(k) [26 USCS § 404(k)] applies.

(D) Special rule for rollover contributions. A plan shall not fail to meet the requirements of this paragraph if, under the terms of the plan, the present value of the nonforfeitable accrued benefit is determined without regard to that portion of such benefit which is attributable to rollover contributions (and earnings allocable thereto). For purposes of this

subparagraph, the term "rollover contributions" means any rollover contribution under sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii), and 457(e)(16)].

(12) Faster vesting for matching contributions [Caution: For applicability of this paragraph, see § 633(c) of • P.L. 107-16, which appears as a note to this section.]. In the case of matching contributions (as defined in section 401(m)(4)(A) [26 USCS § 401(m)(4)(A)]), paragraph (2) shall be applied--

(A) by substituting "3 years" for "5 years" in subparagraph (A), and

(B) by substituting the following table for the table contained in subparagraph (B):

Years of service:	The nonforfeitable percentage is:
2	20
3	40
4	60
5	80
6 or more	100.

(b) Accrued benefit requirements.

(1) Defined benefit plans.

(A) 3-percent method. A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than--

(i) 3 percent of the normal retirement benefit to which he would be entitled if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based

on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) 133 1/3 percent rule. A defined benefit plan satisfies the requirements of this paragraph for a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph--

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) Fractional rule. A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the

service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date on which any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Accrual for service before effective date. Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies, but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of--

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974 or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) First two years of service. Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this

paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "years of service" has the meaning provided by section 410(a)(3)(A) [26 USCS § 410(a)(3)(A)].

(F) Certain insured defined benefit plans. Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan--

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 412(i) [26 USCS § 412(i)] (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 412(i) [26 USCS § 412(i)] were satisfied.

(G) Accrued benefit may not decrease on account of increasing age or service. Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before entitlement to benefits payable under title II of the Social Security Act [42 USCS §§ 401 et seq.] which benefits under the plan--

(i) do not exceed such social security benefits, and

(ii) terminate when such social security benefits commence.

(H) Continued accrual beyond normal retirement age.

(i) In general. Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an

employee's benefit accrual is reduced, because of the attainment of any age.

(ii) Certain limitations permitted. A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) Adjustments under plan for delayed retirement taken into account. In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 401(a)(14)(C) [26 USCS § 401(a)(14)(C)], and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to subsection (a)(3)(B), then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee,

with respect to any period of time within a plan year.

(iv) Disregard of subsidized portion of early retirement benefit. A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(v) Coordination with other requirements. The Secretary shall provide by regulation for the coordination of the requirements of this subparagraph with the requirements of subsection (a), sections 404, 410, and 415 [26 USCS §§ 404, 410, and 415], and the provisions of this subchapter [26 USCS §§ 401 et seq.] precluding discrimination in favor of highly compensated employees.

(2) Defined contribution plans.

(A) In general. A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

(B) Application to target benefit plans. The Secretary shall provide by regulation for the application of the requirements of this paragraph to target benefit plans.

(C) Coordination with other requirements. The Secretary may provide by regulation for the coordination of the requirements of this paragraph with the requirements of subsection (a), sections 404, 410, and 415 [26 USCS §§ 404, 410, and 415], and the provisions of this subchapter [26 USCS §§ 401 et seq.] precluding discrimination in favor of highly compensated employees.

(3) Separate accounting required in certain cases. A plan satisfies the requirements of this paragraph if--

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each

employee's accrued benefit.

(4) Year of participation.

(A) Definition. For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 410(a)(5) [26 USCS § 410(a)(5)]. determined without regard to section 410(a)(5)(E) [26 USCS § 410(a)(5)(E)]) as determined under regulations prescribed by the Secretary of Labor which provide for the calculation of such period on any reasonable and consistent basis.

(B) Less than full time service. For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) Less than 1,000 hours of service during year. For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary of Labor) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis solely because such service is not taken into account.

(D) Seasonal industries. In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary of Labor.

(E) Maritime industries. For purposes of this subsection, in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary of

Labor may prescribe regulations to carry out the purposes of this subparagraph.

(c) Allocation of accrued benefits between employer and employee contributions.

(1) Accrued benefit derived from employer contributions. For purposes of this section, an employee's accrued benefit derived from employer contributions as of any applicable date is the excess, if any, of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2) Accrued benefit derived from employee contributions.

(A) Plans other than defined benefit plans. In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is--

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) Defined benefit plans. In the case of a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 417(e)(3) [26 USCS § 417(e)(3)] (as of the determination date).

(C) Definition of accumulated contributions. For

purposes of this subsection, the term "accumulated contributions" means the total of--

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which subsection (a)(2) does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually--

(I) at the rate of 120 percent of the Federal mid-term rate (as in effect under section 1274 [26 USCS § 1274] for the 1st month of a plan year) for the period beginning with the 1st plan year to which subsection (a)(2) applies (by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 417(e)(3) [26 USCS § 417(e)(3)] (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) Adjustments. The Secretary is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(3) Actuarial adjustment. For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other

than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(d) Special rules.

(1) Coordination with section 401(a)(4). A plan which satisfies the requirements of this section shall be treated as satisfying any vesting requirements resulting from the application of section 401(a)(4) [26 USCS § 401(a)(4)] unless--

(A) there has been a pattern of abuse under the plan (such as a dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]), or

(B) there have been, or there is reason to believe there will be, an accrual of benefits or forfeitures tending to discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]).

(2) Prohibited discrimination. Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary to preclude the discrimination prohibited by section 401(a)(4) [26 USCS § 401(a)(4)].

(3) Termination or partial termination; discontinuance of contributions. Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] unless the plan of which such trust is a part provides that--

(A) upon its termination or partial termination, or

(B) in the case of a plan to which section 412 [26 USCS § 412] does not apply, upon complete discontinuance of

contributions under the plan,

the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary to preclude the discrimination prohibited by section 401(a)(4) [26 USCS § 401(a)(4)], may not be used for designated employees in the event of early termination of the plan. For purposes of this paragraph, in the case of the complete discontinuance of contributions under a profit-sharing or stock bonus plan, such plan shall be treated as having terminated on the day on which the plan administrator notifies the Secretary (in accordance with regulations) of the discontinuance.

(4) Repealed.

(5) Treatment of voluntary employee contributions. In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(6) Accrued benefit not to be decreased by amendment.

(A) In general. A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8) [26 USCS § 412(c)(8)], or section 4281 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1441].

(B) Treatment of certain plan amendments. For purposes of subparagraph (A), a plan amendment which has the effect of--(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (ii) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be

treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary shall by regulations provide that this subparagraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

(C) Special rule for ESOPs. For purposes of this paragraph, any--(i) tax credit employee stock ownership plan (as defined in section 409(a) [26 USCS § 409(a)]), or (ii) employee stock ownership plan (as defined in section 4975(e)(7) [26 USCS § 4975(e)(7)]), shall not be treated as failing to meet the requirements of this paragraph merely because it modifies distribution options in a non-discriminatory manner.

(D) Plan transfers.

(i) In general. A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that--

(I) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan,

(II) the terms of both the transferor plan and the

transferee plan authorize the transfer described in subclause (I),

(III) the transfer described in subclause (I) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan,

(IV) the election described in subclause (III) was made after the participant or beneficiary received a notice describing the consequences of making the election, and

(V) the transferee plan allows the participant or beneficiary described in subclause (III) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a single sum distribution.

(ii) Special rule for mergers, etc. Clause (i) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(E) Elimination of form of distribution. Except to the extent provided in regulations, a defined contribution plan shall not be treated as failing to meet the requirements of this section merely because of the elimination of a form of distribution previously available thereunder. This subparagraph shall not apply to the elimination of a form of distribution with respect to any participant unless--

(i) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated, and (ii) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

(e) Application of vesting standards to certain plans.

(1) The provisions of this section (other than paragraph (2)) shall not apply to--

(A) a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]),

(B) a church plan (within the meaning of section 414(e) [26 USCS § 414(e)]) with respect to which the election provided by section 410(d) [26 USCS § 410(d)] has not been made,

(C) a plan which has not, at any time after September 2, 1974, provided for employer contributions, and

(D) a plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) [26 USCS § 501(c)(8) or (9)], if no part of the contributions to or under such plan are made by employers of participants in such plan.

(2) A plan described in paragraph (1) shall be treated as meeting the requirements of this section, for purposes of section 401(a) [26 USCS § 401(a)], if such plan meets the vesting requirements resulting from the application of sections 401(a)(4) and 401(a)(7) [26 USCS §§ 401(a)(4) and 401(a)(7)] as in effect on September 1, 1974.

Pennsylvania Divorce Code, 23 Pa. Cons. Stat. Ann. § 3101 et seq. (2004).

23 Pa. Cons. Stat. Ann. § 3102. Legislative findings and intent

(a) Policy.--The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is the policy of the Commonwealth to:

(1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.

(2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.

(3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.

(4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems.

(6) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.

(b) Construction of part.--The objectives set forth in subsection (a) shall be considered in construing provisions of this part and shall be regarded as expressing the legislative intent.

§ 3323. Decree of court

(a) General rule.--In all matrimonial causes, the court may either dismiss the complaint or enter a decree of divorce or annulment of the marriage.

(b) Contents of decree.--A decree granting a divorce or an annulment shall include, after a full hearing, where these matters are raised in any pleadings, an order determining and disposing of existing property rights and interests between the parties, custody, partial custody and visitation rights, child support, alimony, reasonable attorney fees, costs and expenses and any other related matters, including the enforcement of agreements voluntarily entered into between the parties. In the enforcement of the rights of any party to any of these matters, the court shall have all necessary powers, including, but not limited to, the power of contempt and the power to attach wages.

(c.1) Bifurcation.--With the consent of both parties, the court may enter a decree of divorce or annulment prior to the final determination and disposition of the matters provided for in subsection (b). In the absence of the consent of both parties, the court may enter a decree of divorce or annulment prior to the final determination and disposition of the matters provided for in subsection (b) if:

(1) grounds have been established as provided in subsection (g); and

(2) the moving party has demonstrated that:

(i) compelling circumstances exist for the entry of the decree of divorce or annulment; and

(ii) sufficient economic protections have been provided for the other party during the pendency of the disposition of the matters provided for in subsection (b).

(e) Costs.--The court may award costs to the party in whose favor the order or decree shall be entered or may order that each party shall pay their own costs or may order that costs be divided equitably as it shall appear just and reasonable.

(f) Equity power and jurisdiction of the court.--In all

matrimonial causes, the court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this part and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

(g) Grounds established.--For purposes of subsections (c.1) and (d.1), grounds are established as follows:

(1) In the case of an action for divorce under section 3301(a) or (b) (relating to grounds for divorce), the court adopts a report of the master or makes its own findings that grounds for divorce exist.

(2) In the case of an action for divorce under section 3301(c), both parties have filed affidavits of consent.

(3) In the case of an action for divorce under section 3301(d), an affidavit has been filed and no counter-affidavit has been filed or, if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken and the parties have lived separate and apart for at least two years at the time of the filing of the affidavit.

§ 3332. Opening or vacating decrees

A motion to open a decree of divorce or annulment may be made only within the period limited by 42 Pa.C.S. § 5505 (relating to modification of orders) and not thereafter. The motion may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. A motion to vacate a decree or strike a judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent upon the face of the record must be made within five years after entry of the final decree. Intrinsic fraud

relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.

§ 3333. Res judicata and estoppel

The validity of a divorce or annulment decree granted by a court having jurisdiction over the subject matter may not be questioned by a party who was subject to the personal jurisdiction of the court except by direct appeal provided or prescribed by law. A party who sought and obtained a decree, financed or agreed to its procurement, or accepted a property settlement, alimony pendente lite or alimony pursuant to the terms of the decree, or who remarries after the decree, or is guilty of laches, is barred from making a collateral attack upon the validity of the decree unless, by clear and convincing evidence, it is established that fraud by the other party prevented the making of a timely appeal from the divorce or annulment decree.

§ 3501. Definitions

(a) General rule.—As used in this chapter, "marital property" means all property acquired by either party during the marriage and the increase in value of any nonmarital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1). However, marital property does not include:

(1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in

exchange for such property.

(4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.

(6) Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229) [FN1], as amended, except for those benefits received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans' compensation.

(7) Property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation.

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

(a.1) Measuring and determining the increase in value of nonmarital property.– The increase in value of any nonmarital property acquired pursuant to subsection (a)(1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. Any decrease in value of the nonmarital property of a party shall be offset against any increase in value of the nonmarital property of that party. However, a decrease in value of the nonmarital property of a party shall not be offset against any increase in value of the nonmarital property of the other party or against any other marital property subject to equitable division.

(b) Presumption.–All real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by

the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a).

(c) Defined benefit retirement plans.--Notwithstanding subsections (a), (a.1) and (b):

(1) In the case of the marital portion of a defined benefit retirement plan being distributed by means of a deferred distribution, the defined benefit plan shall be allocated between its marital and nonmarital portions solely by use of a coverture fraction. The denominator of the coverture fraction shall be the number of months the employee spouse worked to earn the total benefit and the numerator shall be the number of such months during which the parties were married and not finally separated. The benefit to which the coverture fraction is applied shall include all postseparation enhancements except for enhancements arising from postseparation monetary contributions made by the employee spouse, including the gain or loss on such contributions.

(2) In the case of the marital portion of a defined benefit retirement plan being distributed by means of an immediate offset, the defined benefit plan shall be allocated between its marital and nonmarital portions solely by use of a coverture fraction. The denominator of the coverture fraction shall be the number of months the employee spouse worked to earn the accrued benefit as of a date as close to the time of trial as reasonably possible and the numerator shall be the number of such months during which the parties were married and not finally separated. The benefit to which the coverture fraction is applied shall include all postseparation enhancements up to a date as close to the time of trial as reasonably possible except for enhancements arising from postseparation monetary contributions made by the employee spouse, including the gain or loss on such contributions.

§ 3502. Equitable division of marital property

(a) General rule.—Upon the request of either party in an action for divorce or annulment, the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such percentages and in such manner as the court deems just after considering all relevant factors. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets. Factors which are relevant to the equitable division of marital property include the following:

(1) The length of the marriage.

(2) Any prior marriage of either party.

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(4) The contribution by one party to the education, training or increased earning power of the other party.

(5) The opportunity of each party for future acquisitions of capital assets and income.

(6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party at the time the division of property is to become effective.

(10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and

certain.

(10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.

(11) Whether the party will be serving as the custodian of any dependent minor children.

(b) Lien.--The court may impose a lien or charge upon property of a party as security for the payment of alimony or any other award for the other party.

(c) Family home.--The court may award, during the pendency of the action or otherwise, to one or both of the parties the right to reside in the marital residence.

(d) Life insurance.--The court may direct the continued maintenance and beneficiary designations of existing policies insuring the life or health of either party which were originally purchased during the marriage and owned by or within the effective control of either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

(e) Powers of the court.--If, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this chapter or with the terms of an agreement as entered into between the parties, after hearing, the court may, in addition to any other remedy available under this part, in order to effect compliance with its order:

(1) enter judgment;

(2) authorize the taking and seizure of the goods and chattels and collection of the rents and profits of the real and personal, tangible and intangible property of the party;

(3) award interest on unpaid installments;

(4) order and direct the transfer or sale of any property required in order to comply with the court's order;

(5) require security to insure future payments in compliance with the court's order;

(6) issue attachment proceedings, directed to the sheriff or

other proper officer of the county, directing that the person named as having failed to comply with the court order be brought before the court, at such time as the court may direct. If the court finds, after hearing, that the person willfully failed to comply with the court order, it may deem the person in civil contempt of court and, in its discretion, make an appropriate order, including, but not limited to, commitment of the person to the county jail for a period not to exceed six months;

(7) award counsel fees and costs;

(8) attach wages; or

(9) find the party in contempt.

(f) Partial distribution.--The court, upon the request of either party, may at any stage of the proceedings enter an order providing for an interim partial distribution or assignment of marital property.

23 Pa.C.S. § 3505 (2005)

Disposition of property to defeat obligations

(a) PRELIMINARY RELIEF.-- Where it appears to the court that a party is about to leave the jurisdiction of the court or is about to remove property of that party from the jurisdiction of the court or is about to dispose of, alienate or encumber property in order to defeat equitable distribution, alimony pendente lite, alimony, child and spousal support or a similar award, an injunction may issue to prevent the removal or disposition and the property may be attached as prescribed by general rules. The court may also issue a writ of ne exeat to preclude the removal.

(b) INVENTORY OF PROPERTY.-- Both parties shall submit to the court an inventory and appraisement, which shall contain all of the following:

(1) A list of the property owned or possessed by either or both of them as of: (i) the date of separation; and (ii) thirty days prior to the date of hearing on equitable distribution.

(2) A list of the value of the property owned or possessed

by either or both of them as of(i) the date of acquisition; (ii) the date of separation; and (iii) thirty days prior to the date of hearing on equitable distribution.

(3) A list of the liabilities of either or both of them as of 30 days prior to the date of hearing on equitable distribution, whether or not the liabilities are related to the property set forth in the inventory and appraisement.

(c) DISCOVERY.-- Discovery under this part shall be as provided for all other civil actions under the Pennsylvania Rules of Civil Procedure.

(d) CONSTRUCTIVE TRUST FOR UNDISCLOSED ASSETS.-- If a party fails to disclose information required by general rule of the Supreme Court and in consequence thereof an asset or assets with a fair market value of $ 1,000 or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition the court granting the award to declare the creation of a constructive trust as to all undisclosed assets for the benefit of the parties and their minor or dependent children, if any. The party in whose name the assets are held shall be declared the constructive trustee unless the court designates a different trustee, and the trust may include any terms and conditions the court may determine. The court shall grant the petition upon a finding of a failure to disclose the assets as required by general rule of the Supreme Court.

(e) ENCUMBRANCE OR DISPOSITION TO THIRD PARTIES.-- An encumbrance or disposition of marital property to third persons who paid wholly inadequate consideration for the property may be deemed fraudulent and declared void.

42 Pa.C.S. § 6108 (2005)

§ 6108. Business records

(a) SHORT TITLE OF SECTION.-- This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."

(b) GENERAL RULE.-- A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) DEFINITION.-- As used in this section "BUSINESS" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

23 Pa.C.S. § 4321 (2005)

§ 4321. Liability for support

Subject to the provisions of this chapter:

(1) Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law.

(2) Parents are liable for the support of their children who are unemancipated and 18 years of age or younger.

(3) Parents may be liable for the support of their children who are 18 years of age or older.

23 Pa.C.S. § 4322 (2005)

§ 4322. Support guideline

(a) STATEWIDE GUIDELINE.-- Child and spousal support shall be awarded pursuant to a Statewide guideline as established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly. The guideline shall be based upon the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support. In determining the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, the guideline shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties' assets, as warrant special attention. The guideline so developed shall be reviewed at least once every four years.

(b) REBUTTABLE PRESUMPTION.-- There shall be a rebuttable presumption, in any judicial or expedited process, that the amount of the award which would result from the application of such guideline is the correct amount of support to be awarded. A written finding or specific finding on the record that the application of the guideline would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, provided that the finding is based upon criteria established by the Supreme Court by general rule within one year of the effective date of this act.

23 Pa.C.S. § 4324 (2005)

§ 4324. Inclusion of spousal medical support

In addition to periodic support payments, the court may require that an obligor pay a designated percentage of a spouse's reasonable and necessary health care expenses. If health care coverage is available through an obligor or obligee at no cost as a benefit of employment or at a reasonable cost, the court shall order an obligor or obligee to provide or extend health care coverage to a spouse. Upon failure of the obligor to make this payment or reimburse the spouse and after compliance with procedural due process requirement, the court shall treat the amount as arrearages.

23 Pa.C.S. § 4326 (2005)

§ 4326. Mandatory inclusion of child medical support

(a) GENERAL RULE.-- In every proceeding to establish or modify an order which requires the payment of child support, the court shall ascertain the ability of each parent to provide health care coverage for the children of the parties and the order shall provide health care coverage for each child as appropriate.

(b) NONCUSTODIAL PARENT REQUIREMENT.-- If health care coverage is available at a reasonable cost to a noncustodial parent on an employment-related or other group basis, the court shall require that the noncustodial parent provide such coverage to the children of the parties. In cases where there are two noncustodial parents having such coverage available, the court shall require one or both parents to provide coverage.

(c) CUSTODIAL PARENT REQUIREMENT.-- If health care coverage is available at a reasonable cost to a custodial

parent on an employment-related or other group basis, the court shall require that the custodial parent provide such coverage to the children of the parties, unless adequate health care coverage has already been provided through the noncustodial parent. In cases where the parents have shared custody of the child and coverage is available to both, the court shall require one or both parents to provide coverage, taking into account the financial ability of the parties and the extent of coverage available to each parent.

(d) ADDITIONAL REQUIREMENT.-- If the court finds that health care coverage is not available to either parent at a reasonable cost on an employment-related or other group basis, the court shall order either parent or both parents to obtain for the parties' children health insurance coverage which is available at reasonable cost.

(D.1) MEDICAL SUPPORT NOTICE.-- The department shall develop a medical support notice for use by the department or domestic relations section in accordance with procedures established by the department. The medical support notice shall comply with national standards established by the Federal Government for medical support notices. The department or domestic relations section shall send the medical support notice to the employer within two business days after the date of entry of an employee who is a new hire into the Commonwealth directory of new hires under section 4392 (relating to employer reporting).

(e) UNINSURED EXPENSES.-- The court shall determine the amount of any deductible and copayments which each parent shall pay. In addition, the court may require that either parent or both parents pay a designated percentage of the reasonable and necessary uncovered health care expenses of the parties' children, including birth-related expenses incurred prior to the filing of the complaint. Upon request of the domestic relations section, the department shall provide

to the domestic relations section all birth-related expenses which the department has incurred in cases it has referred to the domestic relations section for child support services.

(f) PROOF OF INSURANCE.-- Within 30 days after the entry of an order requiring a parent to provide health care coverage for a child or after any change in health care coverage due to a change in the parent's employment, the obligated parent shall submit to the other parent, or person having custody of the child, written proof that health care coverage has been obtained or that application for coverage has been made. Proof of coverage shall consist of at a minimum:

(1) The name of the health care coverage provider.

(2) Any applicable identification numbers.

(3) Any cards evidencing coverage.

(4) The address to which claims should be made.

(5) A description of any restrictions on usage, such as prior approval for hospital admissions, and the manner of obtaining approval.

(6) A copy of the benefit booklet or coverage contract.

(7) A description of all deductibles and copayments.

(8) Five copies of any claim forms.

(g) OBLIGATIONS OF INSURANCE COMPANIES.-- Every insurer doing business within this Commonwealth shall be obligated as follows:

(1) to permit the custodial parent or the provider, with the

custodial parent's approval, to submit claims for covered services without the approval of the noncustodial parent and to make payment on such claims directly to such custodial parent, the provider or, in the case of Medical Assistance patients, to the department;

(2) to provide such information to the custodial parent as may be necessary to obtain benefits, including copies of benefit booklets, insurance contracts and claims information;

(3) if coverage is made available for dependents of the insured, to make such coverage available to the insured's children without regard to enrollment season restrictions, whether the child was born out of wedlock, whether the child is claimed as a dependent on the parent's Federal income tax return, whether the child resides in the insurer's service area, the amount of support contributed by a parent, the amount of time the child spends in the home or the custodial arrangements for the child;

(4) to permit the enrollment of children under court order upon application of the custodial parent, domestic relations section or the department within 30 days of receipt by the insurer of the order;

(4.1) not to disenroll or eliminate coverage of any child unless the insurer is provided satisfactory written evidence that a court order requiring coverage is no longer in effect or that the child is or will be enrolled in comparable health coverage through another insurer which will take effect no later than the effective date of such disenrollment;

(4.2) to receive, process and pay claims (whether or not on behalf of a child), including electronically submitted claims, submitted by the department within the time permitted by law without imposing any patient signature requirement or other requirement different from those imposed upon providers,

agents or assignees of any insured individual;

(5) to provide the custodial parent who has complied with subsection (j) with the same notification of termination or modification of any health care coverage due to nonpayment of premiums or other reason as is provided to other insureds under the policy; and

(6) except as provided in paragraph (4.2), to not take into account the fact that any individual, whether or not a child, is eligible for or is being provided medical assistance when enrolling that individual or when making any payments for benefits to the individual or on the individual's behalf.

(h) OBLIGATIONS OF NONINSURERS.-- To the maximum extent permitted by Federal law, the obligations of subsection (g) shall apply to noninsurers providing health care coverage within this Commonwealth, including health maintenance organizations, self-insured employee health benefit plans and any other entity offering a service benefit plan.

(H.1) OBLIGATIONS OF EMPLOYERS.-- Every employer doing business within this Commonwealth shall be obligated as follows:

(1) in any case in which a parent is required by a court order to provide health coverage for a child and the parent is eligible for family health coverage, the employer shall permit the insured parent to enroll any child who is otherwise eligible without regard to any enrollment season restrictions;

(2) if the insured parent is enrolled but fails to make application to obtain coverage for such child, to enroll the child under the family coverage upon application by the child's other parent, the domestic relations section or the department;

(3) not to disenroll or eliminate coverage of any such child unless the employer is provided satisfactory written evidence that the court or administrative order is no longer in effect, the child is or will be enrolled in comparable health coverage which will take effect not later than the effective date of such disenrollment or the employer has eliminated family health coverage for all of its employees;

(4) to transfer health coverage for any child to the health coverage of the employer upon receipt of a medical support notice under subsection (d.1) issued by the department or a domestic relations section within 20 business days after the date of the notice; and

(5) to notify the domestic relations section whenever the insured parent's employment is terminated.

(i) OBLIGATIONS OF CUSTODIAL PARENT.-- The custodial parent shall comply with the insurer's existing claim procedures and present to the insurer one of the following documents:

(1) a copy of a court order as defined in subsection (l); or

(2) a release signed by the insured permitting the insurer to communicate directly with the custodial parent.

(j) ENFORCEMENT OF ORDER.-- The employee's share, if any, of premiums for health coverage shall be deducted by the employer and paid to the insurer or other entity providing health care coverage. If an obligated parent fails to comply with the order to provide health care coverage for a child, fails to pay medical expenses for a child or receives payment from a third party for the cost of medical services provided to such child and fails to reimburse the custodial parent or provider of services, the court shall:

(1) If, after a hearing, the failure or refusal is determined to

have been willful, impose the penalties of section 4345(a) (relating to contempt for noncompliance with support order).

(2) Enter an order for a sum certain against the obligated parent for the cost of medical care for the child and for any premiums paid or provided for the child during any period in which the obligated parent failed or refused to provide coverage. Failure to comply with an order under this paragraph shall be subject to section 4348 (relating to attachment of income).

(3) Upon failure of the obligated parent to make this payment or reimburse the custodial parent and after compliance with due process requirements, treat the amount as arrearages.

(k) ENFORCEMENT AGAINST INSURERS.-- Any insurer or other entity which violates the obligations imposed upon it under subsection (g) or (h) shall be civilly liable for damages and may be adjudicated in contempt and fined by the court.

(l) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"BIRTH-RELATED EXPENSES." Costs of reasonable and necessary health care for the mother or child or both incurred before, during or after the birth of a child born in or out of wedlock which are the result of the pregnancy or birth and which benefit either the mother or child. Charges not related to the pregnancy or birth shall be excluded.

"CHILD." A child to whom a duty of child support is owed.

"HEALTH CARE COVERAGE." Coverage for medical,

dental, orthodontic, optical, psychological, psychiatric or other health care services for a child. For the purposes of this section, medical assistance under Subarticle (f) of Article IV of the act of June 13, 1967 (P.L. 31, No. 21), known as the Public Welfare Code, shall not be considered health care coverage.

"INSURER." A foreign or domestic insurance company, association or exchange holding a certificate of authority under the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921; a risk-assuming preferred provider organization operating under section 630 of The Insurance Company Law of 1921; a health maintenance organization holding a certificate of authority under the act of December 29, 1972 (P.L. 1701, No. 364), known as the Health Maintenance Organization Act; a fraternal benefit society holding a certificate of authority under the act of December 14, 1992 (P.L. 835, No. 134), known as the Fraternal Benefit Societies Code; a hospital plan corporation holding a certificate of authority under 40 Pa.C.S. Ch. 61 (relating to hospital plan corporations); a professional health service plan corporation holding a certificate of authority under 40 Pa.C.S. Ch. 63 (relating to professional health services plan corporations); or a similar entity authorized to do insurance business in this Commonwealth.

"MEDICAL CHILD SUPPORT ORDER." An order which relates to the child's right to receive certain health care coverage and which:

(1) includes the name and last known mailing address of the parent providing health care coverage and the name and last known mailing address of the child;

(2) includes a reasonable description of the type of coverage to be provided or includes the manner in which

coverage is to be determined;

(3) designates the time period to which the order applies;

(4) if coverage is provided through a group health plan, designates each plan to which the order applies as of the date the order is written;

(4.1) requires that, if health care coverage is provided through the noncustodial parent's employer and that parent changes employment, the provisions of the order will remain in effect for the duration of the order and will automatically apply to the new employer. The new employer shall enroll the child in health care coverage without need for an amended order unless the noncustodial parent contests the enrollment; and

(5) includes the name and address of the custodial parent.

Pennsylvania Rules of Evidence

Pa.R.E. 103 (2005)

Rule 103. Rulings on evidence

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless

(1) Objection. In case the ruling is one admitting evidence, a timely objection, motion to strike or motion in limine appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or by motion in limine or was apparent

from the context within which the evidence was offered.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Pa.R.E. 201 (2005)

Rule 201. Judicial notice of adjudicative facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary

information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury that it may, but is not required to, accept as conclusive, any fact judicially noticed.

Pa.R.E. 401 (2005)

Rule 401. Definition of "relevant evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pa.R.E. 402 (2005)

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Pa.R.E. 403 (2005)

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 404 (2005)

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except as follows:

(1) *Character of accused.* In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same.

(2) *Character of complainant.*

(i) In a criminal case, evidence of a pertinent trait of character of the complainant is admissible when offered by the accused, or by the prosecution to rebut the same.

(ii) In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same.

(iii) In a civil action for assault and battery, evidence of a character trait of violence of the plaintiff may be admitted when offered by the defendant to rebut evidence that the

defendant was the first aggressor.

(3) *Character of witness.* Evidence of a pertinent trait of character of a witness is admissible as provided in Rules 607 (Impeachment of Witness), 608 (Character and Conduct of Witness) and 609 (Evidence of Conviction of Crime).

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of any such evidence it intends to introduce at trial.

Pa.R.E. 405 (2005)

Rule 405. Methods of proving character

(a) Reputation evidence. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character

trait in question, except that in criminal cases inquiry into allegations of other criminal misconduct of the accused not resulting in conviction is not permissible.

(b) Specific instances of conduct. Specific instances of conduct are not admissible to prove character or a trait of character, except as follows:

(1) In civil cases where character or a trait of character is admissible as an element of a claim or defense, character may be proved by specific instances of conduct.

(2) In criminal cases where character or a trait of character is admissible under Pa.R.E. 404(a)(2), the accused may prove the complainant's character or trait of character by specific instances of conduct.

Pa.R.E. 608 (2005)

Rule 608. Evidence of character and conduct of witness

(a) Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of reputation as to character, but subject to the following limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness; and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific instances of conduct. Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) the character of a witness for truthfulness may not be

attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,

(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

Pa.R.E. 801 (2005)

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Pa.R.E. 802 (2005)

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

(5) Recorded recollection [not adopted].

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6) [not adopted].

(8) Public records and reports [not adopted].

(9) Records of vital statistics [not adopted].

(10) Absence of public record or entry [not adopted].

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious

organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document, other than a will, purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises [not adopted].

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction [not adopted].

(23) Judgment as to personal, family, or general history or boundaries [not adopted].

(24) Other exceptions [not adopted].

(25) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the

declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Pa.R.E. 806 (2005)

Rule 806. Attacking and supporting credibility of declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Pa.R.E. 901 (2005)

Rule 901. Requirement of authentication or identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a

document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by law.* Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.

Pennsylvania Rules of Professional and Judicial Conduct

Pa. RPC 3.7 (2005)

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Pa. Code Judicial Conduct 2 (2005)

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Note: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

Pa. Code Judicial Conduct 3 (2005)

Canon 3. A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Note: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, must not consider ex parte communications concerning a pending proceeding.

(5) A judge should dispose promptly of the business of the court.

Note: Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under

submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Note: "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR 7-107 of the Code of Professional Responsibility.

(7) A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings; and

(ii) the parties have consented, and the consent to being

depicted or recorded has been obtained from each witness appearing in the recording and reproductions; and

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

(d) the use of electronic broadcasting televising, recording and taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions of any trial court non-jury civil proceeding, however, for the purposes of this subsection "civil proceedings" shall not be construed to mean a support, custody or divorce proceeding. Subsection (iii) and (iv) shall not apply to non-jury civil proceedings as heretofore defined. No witness or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such witness or party be broadcast or telecast. Permission for the broadcasting, televising, recording and photographing of any civil non-jury proceeding shall have first been expressly granted by the judge, and under such conditions as the judge may prescribe in accordance with the guidelines contained in this Order.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards

of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Note: Disciplinary measures may include reporting a judge's or lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Note: Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning

it;

Note: A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Note: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

Note: According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, if substantial, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual

insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a substantial "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of securities.

Pa. R.C.P. No. 1910.9 (2005)

Rule 1910.9. Discovery

(a) Except as provided in Rule 1910.11(j) and Rule 1910.12(c), there shall be no discovery in an action for support unless authorized by special order of court.

(b) Where a party is employed, the court shall ascertain the party's earnings and may enter an order directing the employer to furnish earnings information to the court as provided by Rule 1910.28.

Pa. R.C.P. No. 1910.16 (2005)

Rule 1910.16. Support Order. Allocation

(a) In an order awarding child support and spousal support, the court may on its own motion or upon the motion of either party

(1) make an unallocated award in favor of the spouse and one or more
children, or

(2) state the amount of support allocable to the spouse and the amount

allocable to each child.

(b) An unallocated order in favor of the spouse and one or more children shall be a final order as to all claims covered in the order. No motion for post-trial relief may be filed to the final order.

Pa. R.C.P. No. 1910.16-2 (2005)

Rule 1910.16-2. Support Guidelines. Calculation of Net Income

The amount of support to be awarded is based in large part upon the parties' monthly net income.

(a) Monthly Gross Income. Monthly gross income is ordinarily based upon at least a six-month average of all of a party's income. The term "income" is defined by the support law, 23 Pa.C.S. § 4302, and includes income from any source. The statute lists many types of income including, but not limited to:

(1) wages, salaries, bonuses, fees and commissions;

(2) net income from business or dealings in property;

(3) interest, rents, royalties, and dividends;

(4) pensions and all forms of retirement;

(5) income from an interest in an estate or trust;

(6) Social Security disability benefits, Social Security retirement benefits, temporary and permanent disability benefits, workers' compensation and unemployment compensation;

(7) alimony if, in the discretion of the trier of fact, inclusion of part or all of it is appropriate; and

(8) other entitlements to money or lump sum awards, without regard to source, including lottery winnings, income tax refunds, insurance compensation or settlements; awards and verdicts; and any form of payment due to and collectible by an individual regardless of source.

(b) Treatment of Public Assistance, SSI Benefits and Social Security Payments to a Child Due to a Parent's Death, Disability or Retirement.

(1) Neither public assistance nor Supplemental Security Income (SSI) benefits shall be counted as income for purposes of determining support.

(2) If a child for whom support is sought is receiving Social Security benefits as a result of a parent's retirement, death or disability, the benefits the child receives shall be added to the combined monthly net incomes of the obligor and obligee to calculate the income available for support on the vertical axis of the basic child support schedule set forth in Rule 1910.16-3. The presumptive amount of support as set forth on the schedule at the combined income of the obligee, obligor and child's benefits shall then be reduced by the amount of the child's benefits before apportioning the remaining support obligation between the parties pursuant to Rule 1910.16-4. For purposes of determining the support obligation of a surviving parent when the child is receiving benefits as the result of the other parent's death, the income of a non-parent obligee who is caring for a child but has no support obligation to that child shall include only those funds the obligee is receiving on behalf of the child.

Example # If the obligor has net monthly income of $ 1200

per month; the obligee has net monthly income of $ 800; and the child receives Social Security derivative benefits of $ 300 per month as a result of either the obligor's or obligee's retirement or disability, then the total combined monthly net income is $ 2,300. Using the schedule at Rule 1910.16-3 for one child, the amount of support is $ 539 per month. From that amount, subtract the amount the child is receiving in Social Security derivative benefits ($ 539 minus $ 300 equals $ 239). Then, apply the formula at Rule 1910.16-4 to apportion the remaining child support amount of $ 239 between the obligor and the obligee in proportion to their respective incomes. Obligor's $ 1200 net income per month is 60% of the total of obligor's and obligee's combined net monthly income. Thus, obligor's support obligation would be 60% of $ 239, or $ 143.40, per month.

Example 2. Two children live with grandmother who receives $ 400 per month in Social Security death benefits for the children as a result of their father's death. Grandmother also receives $ 500 per month from a trust established by father for the benefit of the children. Grandmother is employed and earns $ 2,000 net per month. Grandmother seeks support from the children's mother, who earns $ 1,500 net per month. For purposes of calculating mother's support obligation, grandmother's income will be $ 500, the amount she receives on behalf of the children from the trust. Therefore, obligee's and obligor's combined net monthly incomes total $ 2,000. Add to that the $ 400 in Social Security benefits grandmother receives for the children to find the basic child support amount in Rule 1910.16-3. The basic support amount at the $ 2,400 income level for two children is $ 811. Subtracting from that amount the $ 400 in Social Security derivative benefits grandmother receives for the children, results in a basic support amount of $ 411 to be apportioned between the parties. As mother's income is 75% of the parties' combined income of $ 2000, her support obligation to grandmother is $ 308 per month.

(c) Monthly Net Income.

(1) Unless otherwise provided in these rules, the court shall deduct only the following items from monthly gross income to arrive at net income:

(A) federal, state, and local income taxes;

(B) F.I.C.A. payments and non-voluntary retirement payments;

(C) union dues; and

(D) alimony paid to the other party.

(2) In computing a spousal support or alimony pendente lite obligation, the court shall deduct from obligor's monthly net income all of his or her child support obligations and any amounts of spousal support, alimony pendente lite or alimony being paid to former spouses.

(d) Reduced or Fluctuating Income.

(1) *Voluntary Reduction of Income.* Where a party voluntarily assumes a lower paying job, there generally will be no effect on the support obligation. A party will ordinarily not be relieved of a support obligation by voluntarily quitting work or by being fired for cause.

(2) *Involuntary Reduction of Income.* No adjustments in support payments will be made for normal fluctuations in earnings. However, appropriate adjustments will be made for substantial continuing involuntary decreases in income.

(3) *Seasonal Employees.* Support orders for seasonal employees, such as construction workers, shall ordinarily be

based upon a yearly average.

(4) *Income Potential.* Ordinarily, a party who wilfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

(e) Net Income Affecting Application of the Child Support Guidelines.

(1) *Low Income Cases.*

(A) When the obligor's monthly net income and corresponding number of children fall into the shaded area of the schedule set forth in Rule 1910.16-3, the basic child support obligation shall be calculated using the obligor's income only. For example, where obligor has monthly net income of $ 750, the presumptively correct amount of support for three children is $ 184 per month. This amount is determined directly from the schedule in Rule 1910.16-3.

(B) In computing a basic spousal support or alimony pendente lite obligation, the presumptively correct amount of support shall not reduce the obligor's net income below $ 550 per month. For example, if obligor earns $ 600 per month and obligee earns $ 300 per month, the formula in Part IV of Rule 1910.16-4 would result in a support obligation of $ 120 per month. Since this amount leaves the obligor with only $ 480 per month, it must be adjusted so that obligor retains at least $ 550 per month. The presumptively correct minimum amount of spousal support, therefore, is $ 50 per month in this case.

(C) When the obligor's monthly net income is $ 550 or less, the court may award support only after consideration of the

obligor's actual living expenses.

(2) *High Income Child Support Cases.* When the parties' combined net income exceeds $ 15,000 per month, child support shall be calculated pursuant to *Melzer v. Witsberger*, 505 Pa. 462, 480 A.2d 991 (1984). The presumptive minimum amount of child support shall be obligor's percentage share of the highest amount of support which can be derived from the schedule for the appropriate number of children and using the parties' actual combined income to determine obligor's percentage share of this amount. The court may award an additional amount of child support based on the parties' combined income and the factors set forth in *Melzer*. The *Melzer* analysis in high income child support cases shall be applied to all of the parties' income, not just to the amount of income exceeding $ 15,000 per month. In a *Melzer* analysis case, the presumptive minimum remains applicable.

For example, where obligor and obligee have monthly net incomes of $ 17,000 and $ 4,000 respectively, the presumptive minimum amount of child support for three children is calculated as follows: using the formula in Rule 1910.16-4, determine the parties' percentage shares of income based on their actual combined income--81% and 19% respectively of $ 21,000. Using the schedule in Rule 1910.16-3, find the highest possible combined child support obligation for three children--$ 3,480. Obligor's percentage share of the combined obligation is 81% of $ 3,480, or $ 2,818. This is the presumptive minimum amount of child support that he or she must pay for three children. Since this amount is derived from the schedule in Rule 1910.16-3, which is limited to combined household income of $ 15,000, the court may award an additional amount of support based on the factors set forth in *Melzer*.

(f) Dependency Tax Exemption. In order to maximize the

total income available to the parties and children, the court may, as justice and fairness require, award the federal child dependency tax exemption to the non-custodial parent, or to either parent in cases of equally shared custody, and order the other party to execute the waiver required by the Internal Revenue Code, 26 U.S.C.A. § 152(e). The tax consequences resulting from an award of the child dependency exemption must be considered in calculating each party's income available for support.

Pa. R.C.P. No. 1910.19 (2005)

Rule 1910.19. Support Modification. Termination. Guidelines as Substantial Change in Circumstance

(a) A petition for modification or termination of an existing support order shall specifically aver the material and substantial change in circumstances upon which the petition is based. A new guideline amount resulting from new or revised support guidelines may constitute a material and substantial change in circumstances. The existence of additional income, income sources or assets identified through automated methods or otherwise may also constitute a material and substantial change in circumstances.

(b) The procedure upon the petition shall be in accordance with Rule 1910.10 et seq.

(c) Pursuant to a petition for modification, the trier of fact may modify or terminate the existing support order in any appropriate manner based upon the evidence presented.

(d) All charging orders for spousal support and alimony pendente lite shall terminate upon the death of the payee spouse.

(e) Within one year of the date a child who is the subject of

a child support order reaches eighteen (18) years of age, the domestic relations section shall issue an emancipation inquiry and notice to the obligee, with a copy to the obligor, seeking the following information:

(1) confirmation of the child's date of birth, date of graduation or withdrawal from high school;

(2) whether the child has left the obligee's household and, if so, the date of departure;

(3) the existence of any agreement between the parties requiring payments for the benefit of the child after the child has reached age eighteen (18) or graduated from high school; and

(4) any special needs of the child which may be a basis for continuing support for that child beyond the child's eighteenth birthday or graduation from high school, whichever is last to occur.

The notice shall advise the obligee that if the inquiry is not returned within thirty (30) days of mailing or if there is no agreement or the child does not have any special needs, the charging order may be modified or terminated by the court. When no other children are subjects of the child support order and the obligee either does not return the emancipation inquiry within thirty (30) days of its mailing or does not assert grounds for continuing support for the child, then the court shall have the authority to administratively terminate the child support charging order without further proceedings at any time on or after the last to occur of the date the last child reaches age eighteen (18) or graduates from high school. Termination of the charging order shall not affect any arrears accrued through the date of termination. The court shall have the authority to enter an order requiring the obligor to pay on arrears in an amount equal to the amount of the

charging order until all arrears are paid.

If the order applies to another child or children and/or the obligee asserts that there is an agreement between the parties or that a child has special needs requiring continued support, then the domestic relations section may schedule a conference to determine if the charging order should be modified.

Pa. R.C.P. No. 1910.24 (2005)

Rule 1910.24. Support Order. Enforcement. Judgment for Arrearages. Petition to Correct Judgment. Execution

(a) On and after the date it is due, overdue support shall constitute a judgment against the obligor as provided by law. The prothonotary shall enter the judgment of record upon the proper docket and in the judgment index either at the direction of the court or upon praecipe of a party or the domestic relations section. The judgment must be accompanied by a written certification showing that obligor owes overdue support pursuant to an order of court.

(b) A petition to correct the judgment shall be limited to the following grounds: (1) no overdue support exists under the support order or (2) there is a mistake in the amount of overdue support. The petition initially shall be determined before a conference officer or hearing officer in the same manner as an original proceeding for support. Except as provided by order of court, the filing of a petition to correct a judgment shall not stay the proceedings.

(c) The judgment may be enforced against the obligor's real or personal property as provided by Rules 3001 through 3011, governing transfer of judgments, and Rules 3101 through 3149, governing enforcement of judgments for the payment of money.

Pa. R.C.P. No. 1920.33 (2005)

Rule 1920.33. Joinder of Related Claims. Distribution of Property. Enforcement

(a) Within ninety days after service of a pleading or petition containing a claim for determination and distribution of property under Section 3502 of the Divorce Code, each party shall file an inventory specifically describing all property owned or possessed at the time the action was commenced. The inventory shall set forth as of the date of the filing of the complaint

(1) a specific description of all marital property in which either or both have a legal or equitable interest individually or with any other person and the name of such other person; and

(2) a specific description of all property in which a spouse has a legal or equitable interest which is claimed to be excluded from marital property and the basis for such exclusion.

(b) Within the time required by order of court or written directive of the master or, if none, at least sixty days before the scheduled hearing on the claim for the determination and distribution of property, each party shall file and serve upon the other party a pre-trial statement. The pre-trial statement shall include the following matters, together with any additional information required by special order of the court:

(1) a list of assets, which may be in chart form, specifying

(i) the marital assets, their value, the date of the valuation, whether any portion of the value is non-marital, and any liens or encumbrances thereon, and

(ii) the non-marital assets, their value, the date of the valuation, and any liens or encumbrances thereon;

(2) the name and address of each expert whom the party intends to call at trial as a witness. A report of each expert witness listed shall be attached to the pre-trial statement. The report shall describe the witness's qualifications and experience and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion;

(3) the name, address and a short summary of the testimony of each person, other than the party, whom the party intends to call at trial as a witness;

(4) a list of all of the exhibits which the party expects to offer in evidence, each containing an identifying mark. Any exhibits that do not exceed three pages shall be attached to the pre-trial statement, and any exhibits which exceed three pages shall be described;

(5) the party's gross income from all sources, each payroll deduction, and the party's net income, including the party's most recent state and federal income tax returns and pay stubs;

(6) if the party intends to offer any testimony as to his or her expenses, a current expense statement in the form required by the practice and procedure governing an action in support;

(7) the value of a pension or retirement benefits, the marital portion thereof, and the facts and documentation upon which the party relies to support the valuation;

(8) if there is a claim for counsel fees, the amount of fees to

be charged, the basis for the charge, and a detailed itemization of the services rendered;

(9) where there is a dispute, the description and value of any items of tangible personal property, the method of evaluating each item, and the evidence, including documentation, to be offered in support of the valuation;

(10) a list of marital debts including the amount of each debt as of the date of separation, the date on which the debt was initially incurred, the initial amount of the debt and its purpose, the amounts and dates of payments made since the date of separation, and the evidence that will be offered in support [FN1] the claim;

(11) a proposed resolution of the economic issues.

(c) If a party fails to file either an inventory as required by subdivision (a) or a pre-trial statement as required by subdivision (b), the court may make an appropriate order under Rule 4019(c) governing sanctions.

(d)(1) A party who fails to comply with a requirement of subdivision (b) of this rule shall, except upon good cause shown, be barred from offering any testimony or introducing any evidence in support of or in opposition to claims for the matters not covered therein.

(2) A party shall, except upon good cause shown, be barred from offering any testimony or introducing any evidence that is inconsistent with or which goes beyond the fair scope of the information set forth in the pre-trial statement.

(e) An order distributing property under Section 3502 of the Divorce Code may be enforced as provided by the rules governing actions for support and divorce, and in the Divorce Code.

Pa. R.C.P. No. 1930.5 (2005)

Rule 1930.5. Discovery in Domestic Relations Matters

(a) There shall be no discovery in a simple support, custody or Protection from Abuse proceeding unless authorized by order of court.

(b) Discovery shall be available without leave of court in accordance with R. C. P. 4001 et seq. in alimony, equitable distribution, counsel fee and expense and complex support proceedings.

FILED
DEC 3 0 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-419

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI *Pro se*
Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.*,
Respondent/self-employed participant and trustee,
Law firm employer-plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals Third Circuit

Petition for Rehearing

Mary Ellen Chajkowski *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

QUESTIONS PRESENTED

I.

Whether Waiver response, to allegations that breach of *fiduciary* duty violated due process, merits an exercise of the supervisory authority of this Court?

ANSWER: Yes.

II.

Whether denying *Certiorari* with no R.16.1 Summary Disposition on the Merits contravenes federal law?

a) *alternate payee* requests declaratory relief to enforce statutory disclosure from trustees;

b) declaratory relief essential to determine tax liability cannot be enforced without an order.

ANSWER: Yes.

PARTIES

Suit to enforce ERISA component of divorce.

MARY ELLEN CHAJKOWSKI *Pro se,*

Petitioner/alternate payee

v.

JOSEPH J. BOSICK, *et al.*,

Respondent/self-employed participant and trustee,
Law firm employer-plan and plan trustees,
Pennsylvania judges.

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Rule 44.....*Passim.*

Suit to enforce breach of *fiduciary* duty to make statutory disclosures to *alternate payee* in litigation.

CERTIFICATION OF COUNSEL

I certify this Petition for Rehearing is restricted to substantial grounds not previously presented. I present this Petition in good faith and not for delay. Federal statutory rights and duties have not been enforced in equitable distribution litigation.

Substantial Grounds for Rehearing

Enforce *fiduciary* duty of Respondents and courts;
Enforce U.S. Supreme Court request for response;
Enforce this court's Rule 29.6 corporate disclosure;
Enforce Exxon as controlling jurisdictional waiver;
Enforce disclosure of trustee-controlled assets, as a 'Notice' requirement of the Due Process Clause.

Intervening Grounds for Rehearing

Appellate failure to correct errors may be widespread.
State Supreme Court denied *Allocatur* in 2004;
November 2005 state judicial retention election:
1) removed one state Supreme Court justice;
2) retained one Supreme Court justice by 54%.

Self-employed *plan* trustee controls the assets.

Plan disclosures are necessary to assess tax liability of *alternate payee*, related to 2005 order that Petitioner pay $100,00 to Respondent, as 2002 order modified unallocated APL/child support 1998-2002. 403(a) *plan* summary, provided to DRO in response to support subpoena, states it is not an ERISA plan.

Respectfully submitted,

_____

Mary Ellen Chajkowski, Petitioner *Pro se*

JURISDICTIONAL STATEMENT

Order to be Reviewed

Chajkowski v. Bosick, Petition for *Writ of Certiorari* denied, December 5, 2005.

Statutes Conferring Jurisdiction

Rules of the Supreme Court of the United States,
Rule 44, Petition for Rehearing, Substantial and Intervening Grounds not previously presented.
Rule 29.6 - Corporate Disclosure.
Rule 10 (a) and (c).
Rule 11 – Public importance.

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make. U.S.C.A. Const. Art. III s2, cl.2

Cases in the courts of appeals may be reviewed by the Supreme Court by: (1) *writ of Certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. 28 U.S.C. s.1254 (1988).

U.S. Const. Amend. XIV, section 1 "....nor shall any State deprive any person of life, liberty, or property, without due process of law.

Statement of the Case

An *alternate payee* suit to enforce ERISA component of a divorce action was *sua sponte* dismissed by a district court that waived jurisdiction relying on *Rooker Feldman* doctrine, affirmed by the appeal court contrary to Exxon Mobil v. Saudi Basic, 125 S.Ct. 1521 (2005).

The Supreme Court of the United States docketed the Petition for *Writ of Certiorari* and directed Respondents to Answer by a specific date.
a) Self-employed *plan participant-trustee*; the *plan-trustees*; and *plan* Respondents are represented by a law partner and filed one Waiver.
b) Pennsylvania judges filed a separate Waiver.
c) No Respondent filed R.12.6 Corporate Disclosure.

The Supreme Court of the United States did not construe Respondent Waiver in favor of Petitioner Instead, it denied a *Writ of Certiorari* without giving a reason and no summary disposition on the merits was entered, precluding finality, which failed to serve the mandate conferred by statutory jurisdiction.

Undisputed Complaint allegations constitute violation of law, penalties vary for each respondent subject to statutory and /or *fiduciary* duties to:

1) disclose information to the court;
2) disclose pursuant to a subpoena;
3) supplement material information;
4) admit evidence in good faith;
5) comply with law and procedure;
6) disclose assets to a former spouse;
7) obey APL/child support orders;
8) file an interim QDRO;
9) equitably enforce the law.

Respondents were construed as 'one' in error, here.

All retirement and deferred income assets are within possession and control of Respondent Bosick, a self-employed attorney licensed in PA since 1973. Petitioner Chajkowski, an elementary teacher until 1977, no paid employment while raising children, became a PA licensed attorney December 19, 2000, worked for $15 per hour in 2002, self-employed 2003 to date. Marital assets accrued for more than two decades include: insurance, securities, real estate and corporate assets. Non-marital assets were not filed.

Bosick's *fiduciary* duty as an officer of the court was not enforced,1998-2002, as he never once paid in full the unallocated APL/child support order. Judge Baer's order for $49,975 in arrears assessed a $0 penalty payment to the arrears [Appendix I, p. 44]. Bosick entered no interim QDRO, as ordered [Id. 19], which Pennsylvania judges failed to enforce.

Petitioner's right to *plan* information in the possession of self-employed *plan participant-trustee* and the *plan-trustee* Respondents has never been fully litigated; as the court accepted a 'counsel stipulation' of 'marital value' in place of verified *plan* evidence. Judge Eaton permitted counsel to withdraw without first entering Petitioner's QDRO, per 2002 equitable distribution order, an egregious exercise of discretion where Counsel filed the divorce action July 3, 1997 and stipulated 2001 on value of retirement, deferred income assets. The court refused to compel disclosure, entered a 2003 QDRO, a loss of $100,000 and 'froze' assets in Bosick's control [Id. at p.25].

Petitioner believes no 1998 support order was necessary. Failure to enforce disclosure laws in 1997 prolonged litigation. Forcing Petitioner to pay joint mortgages and refinance: to compensate for arrears, litigate divorce, pay law school and taxes, which state courts did not incorporate in equitable distribution.

Summary of the Argument

Lower courts recognize a *fiduciary* duty to enforce the rights and duties of 'protected persons'. "In execution of the court's *fiduciary* duty, the court must ensure that 'members of the class' [receive] the best 'notice' practicable under the circumstances..." Thomas v. NCO Financial, Inc., 00-cv-05118, U.S. D.Ct. E.D. of Pennsylvania (2004). Disclosure here is the best practicable notice under the circumstances and it satisfies the due process requirements of the Fifth Amendment to the U. S. Constitution. Id.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." Id. *Citing* Mullane v. Central Hanover B& T, 339 U.S. 306, 314, 70 S.Ct. 652,657 (1950).

Bosick has multiple *fiduciary* duties here: 1) as a practicing attorney and officer of the court; 2) as a party in divorce litigation; and 3) as a trustee, retaining authority to establish and amend deferred income *plans,* including trusts, while exercising possession and control of substantial marital assets.

Plan trustee respondents have *fiduciary* duties: as 1)officers of the court; 2) employers; 3) by statute.

The *fiduciary* respondents did not dispute complaint allegations that they profited from assets within their control at Petitioner's expense, a breach of duty subject to a *fiduciary* standard. Respondents reserve discretionary authority, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 102 (1989), therefore, Petitioner's undisputed allegations warrant an *arbitrary and capricious* review. Id.at 111.

Fiduciary respondents fund and administer *plan* contributions, a conflict that warrants a heightened form of the *arbitrary and capricious* standard of review, Pinto v. Reliance Standard Life, 214 F.3d 377, 378 (3d Cir. 2000), as Respondents exercised discretion by waiving the right to defend actions inconsistent with an exercise of discretion by a *fiduciary* acting free of the interests that conflict with those of beneficiaries. This appeal court has held *fiduciaries* to a standard of care commensurate with their responsibilities. Pinto at 391. Factors this appeal court has used in deciding the severity of conflict: 1) the sophistication of the parties; 2) information accessible to the parties; 3) financial arrangements; and 4) exact status of the *fiduciary*. Pinto at 392.

Petitioner filed a *pro se* brief alleging *fiduciary* breach of duty, undisclosed assets, and losses that unjustly enrich self-employed *plans*, which Bosick failed to deny, his counsel arguing before the Pennsylvania Superior Court that Petitioner has alternate remedies to be heard on undisclosed assets. Petitioner must identify the assets in order to file a Constructive Trust in state court, which makes the suit for a Declaratory Judgment an independent claim.

In a capricious and arbitrary abuse of judicial discretion, the lower courts waived jurisdiction over undisputed claims that breach of *fiduciary* duty violated the law and occasioned loss to Petitioner, waiving jurisdiction contrary to controlling authority. "If a party presents in federal court an independent claim, even though it may deny a legal conclusion a state court has reached in a previous action to which that was party was also a party, then there is jurisdiction, and state law determines how preclusion would apply." Exxon Mobil v Saudi Basic, 125 S.Ct. 1521, 1517 (2005).

Under the Fourteenth Amendment, statutory rights may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

> The purpose of this requirement is not only to ensure abstract fair play. Its purpose, more particularly, is to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. Id.

All economic issues, including child support, were litigated between the parties. Petitioner filed for divorce July3, 1997; the first support hearing was held February 1998, December 1998 Judge Baer, entered a support order [Appendix I, p. 33, 36], that modified the hearing officer's March 1998 [Id., p.27] unallocated APL/child support order, omitted health care, insurance, tuition, real estate expenses and excluded 401k contributions. No retroactivity or attorney fees were ever awarded 1997 to date.

Bosick filed for a 'complex' hearing on support in 1997, yet was granted 2002 retroactive modification arguing that support decisions should be referenced by support guidelines, reversing a request for 'complex' support consideration, which delayed an award for support nearly one year. Judge Eaton granted modification retroactive to 1998; ordered suspension of APL/child support as an unprecedented sanction for appealing the 2002 order. Petitioner was prejudiced and forced to generate self-supporting income, while appealing deprivation of property.

State courts, in *bias* or error, denied Petition to supplement evidence and denied due process on undisputed complaint allegations Petitioner was deprived of property interest protected by statute.

Writ of Certiorari was denied here without a summary disposition on the merits, an application of law that is not equitable or final. "Federal bankruptcy courts have held that a debtor in possession owes a *fiduciary* duty to both the estate and the court. This *fiduciary* duty includes a duty to disclose all known material." TENN-FLA, a partnership, v. First Union National Bank of Florida, as trustee, US D.Ct. for W.D. of Tennessee, W.D., 229 B.R. 720; 1999. If affirmed, this order will not effect justice, as:

1) Lower courts in Tennessee protect disclosure rights of unsecured creditors; while,
2) lower courts in Pennsylvania elect not to protect disclosure rights of a spouse in the dissolution of marriage, waiving jurisdiction.

State courts failed to enforce the *fiduciary* duty, of attorneys, as officers of the court: 1) No interim QDRO was filed or enforced; 2) a *hearsay* counsel stipulation was accepted as evidence; 3) stipulating counsel was permitted to withdraw without entering Petitioner's QDRO two years after stipulation at trial. Undisputed complaint allegations that Respondents breached fiduciary duties in violation of the law were not construed in Petitioner's favor.

Pennsylvania judges and the lower federal courts, here, failed to enforce Petitioner's statutory right to asset information within the possession and control of Bosick, a 14th amendment violation. They issued orders permitting Bosick to exclude 401k contributions, absent evidence; unanimously denying Petitioner's 401k appeals. Bosick wrote a personal check to an annuity company in 2003, pursuant to the QDRO. This creates ambiguity about Petitioner's tax liability for those funds. Employer provided a 403(a) plan summary to DRO, stating it's not ERISA plan.

It is unconscionable that disclosure rights in divorce did not receive the same federal protection that lower federal courts afford unsecured creditors. "Fraud on the court" has been defined as "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." TENN-FLA *citing* Harbold v. Commissioner, 51 F.3d 618,622 (6th Cir. 1995). In the context of revoking an order of confirmation under sec.1144, this can be restated as requiring:

1) a representation by debtor regarding compliance;

2) which was materially false;

3) that was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard of truth;

4) that was made to induce the court to rely on it;

5) that the court did rely upon; and

6) that as a consequence of such reliance, the court entered the confirmation order.

TENN-FLA, *see* In re Longardner & Associates, Inc., 855 F.2d at 462 n.6 (Chapter 13); Perdido Motel Group, 142 B.R. at 464. In actions to revoke a bankruptcy order, courts have examined the disclosures of a party with the duty disclose for fraudulent omissions. See e.g. In re Circle Corp., 181 B.R. 457, 463-65 (Banker D.Ariz. 1995), *et al.*

The courts have determined fraudulent intent can be shown where "a person who: 1) is obliged to disclose, 2) knows of the existence of material information, and 3) does not disclose it." In re Giguere, 165 B.R. at 534, *quoting* In re Michelson, 141 B.R. at 725). A broader examination of a plan proponent's conduct is based on good reason. The integrity of the confirmation process is dependent on a plan proponent's honest compliance." TENN-FLA at 725. The Sixth Circuit has relaxed requirements for finding of fraud on the court and has indicated a willingness to examine a party's withholding of information for fraud. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993) (finding Justice Department attorneys reckless in their failure to disclose information to the other party or to court). "The test for fraud under section 1144 can be restated to account for a party's non-disclosure as follows:

1) an intentional omission;

2) by a party with a duty to disclose;

3) of facts that would be material to finding the party complied with section 1129;

4) that were withheld so that the court would find the party complied with section 1129;

5) and that as a consequence of non-disclosure, the court entered the confirmation order."

TENN-FLA at 726. A party's duty to disclose is a question of law. Id. at 730. *Fiduciary* duty of Respondents was alleged and undisputed here.

The good faith requirement of sec. 1129 will be met if the plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Good faith requires fundamental fairness in dealing with one's creditors." Id. at 735. Allegations that Respondents acted in bad faith are undisputed.

"The dangers resulting from the concealment of assets are greater when a party [the debtor] remains in possession than in cases in which a third party acts as trustee." Id. at 745. " If a debtor in possession were permitted to omit claims in bankruptcy court and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the *fiduciary* status of the debtor in possession." Id.745. Bosick controls assets.

District court found all elements of the test for fraud upon the court via non-disclosure under sec. 1144 were met and affirmed the Bankruptcy Court revocation of its prior confirmation of the TFP plan. The court sanctioned the party breaching its *fiduciary* duty, awarding attorneys fees and expenses incurred. "While ordinarily an award of attorney fees is authorized by contractual or statutory authority, an exception exists where fraud has been practiced upon the court." Id.747 *citing* Chambers v. NASCO, 501 U.S. 32, 46 (1991), *citing* Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). A reasonable person would expect courts to enforce Petitioner's right to disclosure in divorce litigation.

The courts have a fiduciary duty to protected persons in the dissolution of marriage, which must be enforced equitably with practices enforcing disclosure rights of unsecured creditors in bankruptcy. Here, the spouse in possession of undisclosed assets breached *fiduciary* duty as officer of the court and *plan* trustee.

Conclusion

The Supreme Court of the United States requested a response from Respondents within a specific time. Respondents filed Waiver without making R.29.6 corporate disclosure to this court.

WHEREAS, Petitioner experienced judicial *bias,* unsupported by evidence of record, Petitioner requests enforcement of R.29.6 disclosure, to screen conflicts and to ensure an impartial tribunal here.

WHEREIN the alternative, Petitioner requests this court to construe undisputed allegations / Waiver adverse to Respondents; find breach of *fiduciary* duty and issue declaratory relief comparable to courts that protect disclosure rights of unsecured creditors in bankruptcy, to satisfy notice requirements of the due process clause and to equitably enforce the law.

WHEREAS no due process finality has been achieved here, Petitioner requests application of the Exxon federal waiver limitations and preclude waiver.

WHEREIN the alternative, Petitioner requests an order for summary disposition on the merits.

Appellate failure to enforce the law may be widespread, as the 2005 judicial retention election of two state Supreme Court Justices resulted in removal of one and a 54% retention of the other.

WHEREAS all respondents are officers of the court, Petitioner requests this court to fully consider Respondents' undisputed breach of *fiduciary* duty, undisputed unjust enrichment, and remand to the jurisdiction of state court for professional discipline.

Respectfully submitted,

Mary Ellen Chajkowski, Petitioner *Pro se*